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LIMITATIONS UPON THE RULE THAT CRIMINAL INTENT MAY BE PRESUMED FROM THE ACT ITSELF.

One of the most absurd, unjust and illogical of recent opinions is that of the Court of Appeals of Kentucky in the case of Jones v. Commonwealth, 89 S. W. Rep. 174.

This case was a prosecution under a statute of Kentucky making it a felony "to detain any woman against her will *with intent* to have carnal knowledge of her." The evidence showed that as the prosecutrix was riding horse back on a highway defendant got on his horse and came facing her, that he pulled into the middle of the road and she pulled off to the side, that as she pulled off he pulled towards her, that she kept pulling off till she got clear off the road and he still pressed towards her, and that when she got in front of him and ran her horse he wheeled and galloped after her till she came in sight of her home. On this statement of facts the court held that a conviction was warranted, although defendant did not touch the prosecutrix or attempt to touch her or her horse or offer her any improper suggestions. On the question of intention the court said: "The evidence of Miss Fogg is to the effect that the defendant got on his horse and came facing her, that he pulled into the middle of the road and she pulled off to the side, as she pulled off he pulled towards her, she kept pulling off until she got clear off the road. and he still pressed towards her. When she got in front of him, he wheeled his horse and followed her. He did not touch her, or attempt to touch her or her horse. He simply pressed her off the road. It is not necessary that the defendant should take physical hold of the woman in order to constitute a detention. If she is detained by him for the purpose of having carnal knowledge of her, he is guilty, although the detention is slight in point of time and no physical force is actually used. Under the facts stated the woman was not only detained on the highway, but was forced off the highway, and when she succeeded in getting past the defendant he wheeled his horse and followed her at a rapid gait. If he had merely ridden in front of her and had not followed her, there would be more force in the position that there is no evidence to show that he detained her with intent to have carnal knowledge of her. But when he galloped after her, and she had to run her horse to get away from him, and he followed her until she came in sight of her home, we cannot say that there was no evidence to go to the jury on this question."

The trouble with modern courts of last resort in dealing with criminal cases is that they fail to take time to carefully apply ancient common law priciples to modern statutory offenses. For instance, there is no principle of the common law better settled than that there is no crime unless there is a criminal intent. This principle is as applicable to statutory as to common law offenses. Stern v. State, 53 Ga. 229; People v. White, 34 Cal. 183; Rider v. Wood, 2 El. & El. 338; Reg. v. Tolson, 23 Q. B. Div. 168; State v. Eastman, 60 Kan. 557; People v. Welch, 71 Mich. 548. "It is a sacred principle of criminal jurisprudence," said the Tennessee court, "that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny." Duncan v. State, 7 Humph. (Tenn.) 148.

There are two exceptions to this rule: First, in some cases criminal intention is presumed from the act. Thus in Clark & Marshall on Crimes (2nd Ed., 1905), § 58, the rule is thus stated: "If a man voluntarily, and without any mistake as to the facts, does an act which, according to the natural course of events, will probably *injure* another in a *particular* way, it will be presumed, in the absence of evidence to the contrary, that he intended such consequences." Thus where one shoots in the direction of another, it will be presumed that he intended to kill him. Dunaway v. People, 110 Ill. 333. But where the act is in itself not wrong, or not likely to injure the person at whom it is directed, as the mere detention of a person on the highway, no intention to commit a crime can be inferred. Second, a man is responsible for the *unintended* results of a criminal act. Thus where one engaged in the act of

rape accidentally kills his victim, he is guilty of murder. But this exception includes only acts *mala in se*. Thus, again to refer to Clark & Marshall on Crimes, § 71c, the limitation on this exception is thus stated: "The principle that a man who is engaged in the commission of an unlawful act is responsible for the unintended results due to his ignorance of fact does not apply where the act is merely *malum prohibitum*." Thus it is held that one who drives over another is not guilty of criminal assault merely because he was driving at a speed prohibited by an ordinance. Commonwealth v. Adams, 114 Mass. 323. So also, as in the principal case, the detention of a female, or any one else, on the highway, or following after her, are at the most acts *mala prohibita*, and even should a person so detained accidentally stumble by reason of the interference and be injured, the person guilty of the detention would certainly not be liable for assault and battery. *A fortiori*, therefore, in such a case, where no harm comes to the prosecutrix, where her person is not touched or no attempt is made to touch her person or no insult is offered to her, it would be contrary to a most sacred principle of common law to infer an intention to commit a criminal act.

To show the absurdity of the court's position in the principal case it is only necessary to again advert to the facts of the case. A man rides up to a woman on the highway. He says nothing, at least nothing that she hears or understands. She avoids him and starts at a fast pace to get away from him. He follows but finally gives up the pursuit. No crime has been committed. No, it is answered, but he intended to commit a crime. Well, even so, what crime! It would be as easy to presume robbery as rape, or even murder. What crime shall be charged? Suppose the woman detained carried a bag of gold and the prosecuting attorney charged attempt to commit robbery, would that change the presumption from one to commit rape to one to commit robbery? If conviction for felonies is to depend on such absurd presumptions criminal procedure will be robbed of one of its greatest safeguards against oppression and injustice.

There is still another principle violated in the principal case. It is almost axiomatic in criminal law that in every prosecution for an *attempt* to commit a crime it must be shown clearly and unequivocally that the accused intended to commit that particular crime. Reagan v. State, 28 Tex. App. 227. And especially is this true where the statute makes the *intent* in so many words the principal ingredient of the crime. Thus, in the principal case the detention of a female of itself is not a crime, nor does it become a crime until the intent is clearly proven. True, it is not necessary to do the impossible and uncover the secret places of a man's heart and read there the intent with which he does any particular act, but, as we have already seen, where the act done is not one that is naturally calculated to injure one in any *particular* way, the act itself will not constitute a sufficient basis from which to presume the intention to commit any particular crime. There must be other circumstances proved which reasonably tend to show the commission of the particular crime charged before the case should even be submitted to a jury.

NOTES OF IMPORTANT DECISIONS.

CONTRACTS—AGREEMENT FOR COMPENSATION FOR DOCKING HORSE'S TAIL NOT ENFORCEABLE.—That no action can be maintained for his services by a veterinary surgeon, who performs the operation of docking horses' tails, is the unique but very just conclusion of the Circuit Court of Jefferson County, Kentucky, Judge Matthew O'Doherty handing down the opinion. The plaintiff sued for work done for a customer who wanted his carriage horse made fashionable. The defendant counterclaimed for damages, on account of the alleged unskilled manner in which the operation was performed. The court holds that the contract was in violation of the sections of the Kentucky statutes prohibiting cruelty to animals, and was, therefore, void, and neither party can maintain an action for anything growing out of it. The court in its opinion says:

"The statute is both just and humane. That docking is a work of unnecessary cruelty, there can be no room for doubt, unless the alleged style customary among fashionable horse owners, and approved by them, can be held to justify it. The court is unwilling to hold that a statute may be repealed by a fad. That it was violated by both plaintiff and defendant seems clear. The horse's tail, as every one knows, is of immense value to him. It is for many purposes his only means of defense. The act of cutting, or docking, is cruel in itself and still more cruel in

its consequences. It is too well settled to need citation of authorities that a right of action cannot accrue to a party out of his violation of the law. It is also well settled that where both parties have violated the law the court leaves them where it finds them and refuses to give either relief. The case will be dismissed when placed on the trial docket."

CONTRACTS FOR DISPLAY ADVERTISEMENTS ON BUILDINGS AND OTHER STRUCTURES.

1. *Nature of Such Contracts.*—I recently had occasion to investigate this question, and I was surprised at the result of my investigation, and believe that there are others who, never having examined the question, will find this article interesting and instructive; and it may be the means of relieving some of erroneous opinions as to what the law is on this question. This class of contracts is becoming more prevalent each year, consequently the attorneys and the courts will be called upon more frequently to consider the question. I classify the subject generally under the head of contracts for want of a better classification under the present state of the decisions on the question. I was of the opinion that such contracts were mere leases, and was proceeding on that theory; but, to my surprise, I found that the higher courts have unanimously decided that such contracts are not leases and possess none of the characteristics of leases,[1] but that the right acquired by such a contract is a mere license.[2] In other cases it is spoken of as an easement; the court in one case saying, "both parties have argued this case upon the theory that the papers signed by Schilling were leases, and that the use of the wall under them was possession. That is a mistake. The right to use the wall 'was a burden or servitude in the nature of an easement,' carrying with it the right to such access as might be necessary to make the burden of value."[3] And other cases hold that such a contract amounts to a simple contract or bargain for the right to place a sign upon the wall for a compensation, and is not a lease.[4] Consequently a failure of the advertiser to erase the sign after the termination of the contract does not render him liable as a tenant holding over.[5] Nor are the advertisers liable for injuries to third persons from the falling of a bill board used, but not erected by the advertisers, on the building of another, which the advertisers found on the building and acquired the right to use it for advertising purposes for a stipulated compensation.[6]

2. *Remedies under Such Contracts.* —

[1] Wilson v. Tavener, L. R. (1901), ch. 578; Reynolds v. Van Beuren, 155 N. Y. 120; Goldman v. New York Advertising Co. (N. Y.), 29 Misc. Rep. 133; Lowell v. Strahan, 145 Mass. 1; R. J. Gunning v. Cusack, 50 Ill. App. 290. In Wilson v. Tavener, L. R. (1901), ch. 578, by the terms of a written agreement, the owner of buildings agreed to allow another to erect a boarding upon the forecourt of a building, and to use the gable wall of a building for bill-posting purposes, at a stipulated sum payable quarterly, and the court held that this was not a lease from year to year; but that it was a mere license which could be revoked on reasonable notice, and that a quarter's notice which terminated at the end of the current year was a reasonable notice. In the opinion the court said that the written agreement "did not confer on the plaintiff any right to the exclusive possession of any property or building of the defendant, and therefore I think there was no demise or lease, and that the relation of landlord and tenant was never created between them. The effect of the documents, in my opinion, was to give the plaintiff a license which was always revocable at any time, subject to the terms of the express contract."

[2] Lowell v. Strahan, 145 Mass. 1; Reynolds v. Van Beuren, 155 N. Y. 120. In the latter case the defendants acquired from the tenants of a building the right to use a bill board erected upon the roof of the demised premises for a stipulated compensation, and in the course of the opinion the court said: "It is apparent, therefore, that the defendant's liability must be sustained, if at all, upon what must be conceded to be a very close and doubtful construction of a written license granted to them by the tenant in possession to use the sign for a limited time for a specified purpose."

[3] R. J. Gunning Co. v. Cusack, 50 Ill. App. 290. See also Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. Rep. 356, where the right acquired was "all the surface of said fences" surrounding a race track, and the court held that the right acquired related to inside as well as the outside of the fence, and that the privileges accorded, "if not actually an easement, was a burden of servitude in the nature of an easement."

[4] Goldman v. New York Advertising Co. (N. Y.) 29 Misc. Rep. 133, which was an action against the defendant, an advertising company, on the theory that it was liable as a tenant holding over after termination of the year, for failure to erase the sign from plaintiff's wall, and the court said: "It is unnecessary for the determination of this appeal to decide whether the paper here in question created a license or an easement, or was merely a simple contract between the parties. It is sufficient that it is not a lease. Treated as a simple contract, there was no obligation on the part of the defendant to remove the advertisement at the end of the year."

[5] Goldman v. New York Advertising Co. (N. Y.), 29 Misc. Rep. 133.

[6] Reynolds v. Van Beuren, 155 N. Y. 120.

Where the lessees of land for fair grounds and a race-track entered into a contract with a third party whereby the latter acquired the right to use the fence enclosing the land and the buildings erected thereon for advertising purposes, it was held that the advertiser might enforce his rights in and to the land by a suit in equity for specific performance of the contract, or by a suit to restrain its violation.[7] In one case it is intimated that an action for damages will lie for breach of such a contract;[8] and in the same case, where the right acquired by the advertiser was for a yearly compensation payable quarterly, it was held that the right to the premises for advertising purposes might be terminated by reasonable notice, and that a three month's notice terminating at the end of the current year was a reasonable notice.

3. *In Conclusion.*—It may be noted that, almost without exception, such contracts have been drawn in the form of leases; and attorneys in instituting suit upon them, and in the majority of cases, the trial courts, have proceeded upon the theory that such contracts were leases; but without exception the higher courts have held that they were not leases. That much is settled; but just what such contracts amount to, whether licenses, easements or merely a simple contract—is an open question, the weight of authority being that the rights acquired by them are mere licenses.

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[7] Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. Rep. 366. In R. J. Gunning Co. v. Cusack, 50 Ill. App. 290, where two rival advertising companies claimed the right to the use of a wall of a building, and each had repeatedly erased the sign of the other thereon, an injunction was held to be the proper remedy against an invasion of the alleged right. See also Wilson v. Tavener, L. R. (1901), ch. 578.

[8] Wilson v. Tavener, L. R. (1901), ch. 578.

CONSTITUTIONAL LAW—SALES IN BULK.

WRIGHT v. HART.

Court of Appeals of New York, Oct. 3, 1905.

Laws 1902, p. 1249, ch. 528, providing that a sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent as against the creditors of the seller, unless at least five days before sale a full and detailed inventory is made, and the purchaser makes explicit inquiry of the seller as to the names of creditors, and notifies them, etc., is in conflict with Const., art. 1, §§ 1, 6, and Const. U. S. Amend. 14, § 1, guarantying the equal protection of the laws and forbidding deprivation of property without due process of law.

In November, 1903, a corporation known as W. C. Loftus & Co., engaged in the retail clothing and tailoring business in the city of New York, sold to the defendant its entire stock, fixtures and lease for a consideration of $22,953.86. Within a few days thereafter a petition in involuntary bankruptcy proceedings was filed against it, and the plaintiff was elected trustee thereunder. At the time of the sale referred to chapter 528, p. 1249, of the laws of 1902 was in force, and it provided that:

"Section 1. A sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale, in good faith make full explicit inquiry of the seller as to the name and place of residence or place of business of each and every creditor of the seller and the amount owing each creditor, and unless the purchaser shall at least five days before the sale in good faith notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, of such proposed sale and of the stated cost price of merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall at least five days before such sales file a truthful answer in writing of each and all of said inquiries."

The plaintiff, as trustee in bankruptcy of the selling corporation, has brought this action to set aside the sale on the gronnd that it was made without complying with any of the provisions of the statute. The purchasing defendant interposes the demurrer that the complaint does not state facts sufficient to constitute a cause of action because the statute is unconstitutional. This claim of unconstitutionality is based (1) upon article 1, § 1, of our state constitution, which provides that "no member of this state shall be * * * deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers;" (2) upon article 1, § 6, of our state constitution, which provides that no person shall "be deprived of life, liberty or property without due process of law;" and (3) upon section 1 of the fourteenth amendment to the federal constitu-

tion, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

WERNER, J. (after stating the facts): Before proceeding to a critical view of the challenged statute, it may be profitable to make a few pertinent, though trite, observations on the nature, construction, and effect of written constitutions. A written constitution is the fundamental expression of the sovereign will. Under our form of government that sovereign will resides in the people. A written constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control as it is written until it shall be changed by the authority that established it. It is true, as was said by Judge Cooley, that "the weeknesses of a written constitution are that it establishes iron rules which, when found inconvenient, are difficult of change; that it is often construed on technical principles of verbal criticism, rather than in the light of great principles; and that it is likely to invade the domain of ordinary legislation, instead of being restricted to fundamental rules." The logical corollary of the proposition that the constitution is the supreme law of the land is that the power to legislate is a purely delegated one, derived from the constitution and controlled by it. In the case at bar we are concerned with no quibbles of verbiage or technicalities of construction, but with the broad question whether an act of our legislature is repugnant to the "iron rule" of our federal and state constitutions that no citizen shall be deprived of "life, liberty or property," or be denied the "equal protection of the laws."

In the course of judicial interpretation, the words "liberty" and "property," as used in the constitutions, have naturally and properly been given their most comprehensive signification, so that they embrace every form and phase of individual right that is not necessarily taken away by some valid law for the general good. "The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration; but it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." People v. Marx, 99 N. Y. 377, 2 N. E. Rep. 29, 52 Am. Rep. 34. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection." *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636. "'Liberty' * * * includes the right to acquire property, and that means and includes the right to make and enforce contracts." State v. Loomis, 115 Mo. 307, 22 S. W. Rep. 350, 21 L. R. A. 789; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. Ed. 832. The right to use, buy, and sell property is protected by the constitution, and "when the law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power." Wynehamer v. People, 13 N. Y. 378, 398; People v. Otis, 90 N. Y. 48.

Let us now analyze the statute under scrutiny. Every sale (a) "of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or (b) the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless (1) the seller and puchaser shall at least five days before the sale, (2) make a full and detailed inventory, (3) showing the quantity, and, so far as possible with the exercise of reasonable diligence, (4) the cost price to the seller of each article to be included in the sale, and unless (5) such purchaser shall at least five days before the sale in good faith make full, explicit inquiry of the seller as to the (6) name and place of residence or place of business of each and every creditor of the seller, and (7) the amount owing each creditor, and unless (8) the purchaser shall at least five days before the sale in good faith (9) notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge of such proposed sale, and (10) of the stated cost price of merchandise to be sold, and (11) of the price to be paid therefor by the purchaser. (12) The seller shall at least five days before such sale file a truthful answer in writing of each and all of said inquiries." No one will have the temerity to suggest that this drastic and cumbersome statute is not in restraint of the rights of "liberty" and "property," as those terms have been judicially declared to have been used in the federal and state constitutions. It is contended, however, that the restraint which it imposes upon these rights is justifiable under that shibboleth of legislatures and courts known as the "police power." Far be it from us to deny the existence of that power or to attempt to define its extent. It will be our effort, rather, to show that the statute under consideration is in some particulars so thoroughly unrelated to the

probable object of its enactments, and in others so cumbersome, burdensome, unreasonable, and unworkable, as to violate every one of the constitutional provisions under which it is challenged. The rights of "liberty" and "property," as we have seen, are sacred and substantial rights guarantied by the federal and state constitutions. Any law that interferes with the right to make and enforce contracts affects both the liberty and property of the citizen. The right to sell and purchase merchandise in bulk is no less under the protection of the constitution than the right to sell and buy in the smallest possible quantities. Any legislative interference with either of these rights, that is clearly forbidden as to the other, can only be justified on the ground of public necessity, which is but another way of saying that it is for the general welfare. Such interference should not only be based upon public necessity, but it should be conservative, reasonable, and well adapted to the end sought to be attained. Until the 11th day of April, 1902, it was just as lawful in this state to sell any portion of a stock of merchandise, or the whole of such a stock in bulk, as to sell the same goods piece by piece at retail. By the statute which went into operation on that day, the sale of any stock of merchandise in bulk, or of any considerable portion thereof, was made unlawful as against the creditors of the seller, unless both seller and purchaser should do many things that were clearly and substantially restrictive of the right of contract as it had theretofore been enjoyed in repect of such property. This criticism of the statute is sought to be answered by the plea that the law was designed to correct a great public evil; that it was aimed at a class of merchants who have engaged in the fraudulent practice of obtaining merchandise on credit, for the purpose of making hasty and secret sales thereof in bulk and then decamping with, or otherwise disposing of, the proceeds at the expense of their creditors. It may be conceded that this was the ostensible purpose of the statute, and that the evil complained of was one of substantial reality and magnitude, for which an efficacious remedy was much to be desired. But that does not meet the argument against the constitutionality of the statute.

The question still remains whether the legislature has not overstepped the limits of its power, by practically placing an embargo upon all sales of merchandise in bulk, under the guise of a statute ostensibly designed to prevent frauds in such sales. Beginning with the title of the statute, we observe that its object is "to regulate the sale of merchandise in bulk." If we give to the term "merchandise" its ordinary business signification, there is no escape from the conclusion that the statute applies to merchants alone, as distinguished from manufacturers, farmers, bankers, the members of the several professions, mechanics, etc. Under this construction of the law the merchant is prohibited from doing that which is permitted to all other men. Merchants comprise a comparatively small number of the community at large, and therefore this would seem to be class legislation, which denies to those affected by it the equal protection of the laws guarantied by the fourteenth amendment to the federal constitution. If the term "merchandise" is given a somewhat more liberal interpretation, so as to include finished manufactured products, and the stocks of jobbers and wholesale merchants, the statute is still open to the criticism that it denies the equal protection of the laws to all citizens, because it imposes upon certain classes, such as manufacturers, jobbers, and wholesale merchants, burdens that are destructive of their legitimate business. It is common knowledge that in this age of large enterprises many merchants purchase the whole products of mills and factories. In the case of the jobber or the wholesale merchant these products are again sold in bulk, or in large but varying, quantities. If the manufacturer, jobber, or wholesale merchant sell their entire stock in bulk, the statute applies, without regard to the question whether the sale is according to long-established custom, or in the regular course of trade. If there is a sale in bulk of less than the whole, then the validity of the sale is made dependent to some extent upon the question whether it is in the ordinary course of trade in the regular and usual prosecution of the seller's business. What is the ordinary course of trade in the regular and usual prosecution of such a seller's business? The manufacturer may dispose of his entire output to a single purchaser during a single year or a series of years. Again, he may dispose of it in parcels to several purchasers. And yet again, he may be compelled to rely upon a general market, with purchasers from different quarters in varying quantities. On the 1st of January of a given year he may know to a certainty just how much he will produce and just where it will go. At the beginning of the next year he may not know what the morrow will bring forth. This is as true of the jobber and the wholesale merchant as of the manufacturer. And what is the net result? In the years when there is a single sale of the whole output, the statute applies, without regard to the ordinary course of trade or the regular and usual prosecution of the seller's business. In other years, when the sales, although in bulk, are in smaller quantities, the application of the statute depends, not upon the honesty of the transaction, but upon the shadowy question whether it is in the ordinary course of trade in the regular and usual conduct of the seller's business. And all this is as applicable to the purchaser as to the seller, although the former may not have the remotest knowledge of the manner in which the business of the latter is carried on. There are other and more serious constitutional objections to this statute in so far as it may affect the manufacturer, the jobber, and the wholesale merchant; but, as these objections militate against the statute in its relation to all classes

of men, we shall consider them in their general bearing upon the "liberty" and "property" clauses of the two constitutions.

The statute, as we have seen, discriminates between sales of entire stocks in bulk and sales of portions of such stocks. But it does not differentiate between mistakes that are honestly made and sales that are made with intent to defraud. The sale of an entire stock is declared to be fraudulent and void as against the seller's creditors, no matter how solvent he may be, unless all the petty and harrassing details of the statute are observed. The sale of a lesser quantity, however, is interdicted by no such sweeping fiat so long as it is made in the ordinary course of trade in the regular and usual conduct of the seller's business, although made with a fraudulent intent. But this is not all. Both seller and purchaser shall, at least five days before the sale, make a full and detailed inventory. One inventory is not enough. There must be two, or at least one joined in by both. And they must be made, not when the sale has been consummated, but five days before. Could anything be devised that would effectually paralyze sales of merchandise in bulk? Some simple illustrations will clearly outline the pernicious possibilities of this unique provision. A is the owner of a stock of goods, which he is willing to sell and which B is ready to purchase at a price agreed upon. Each may think he is making a good bargain. A is anxious to sell at once, so that he may use the proceeds in making another purchase of advantage. B wants to close the sale at once, because he has an immediate and profitable market for the goods. If either has to wait five days or longer, and particularly for the purpose of making an inventory, involving great labor and expense, he may prefer to drop the whole matter. Suppose, however, that the work of taking an inventory is commenced, and during its progress the market price rises or falls, or that either the seller or the purchaser discovers that he has made a poor bargain, because the inventory discloses a greater or less value than was in the minds of the parties when the price was fixed. In such a case either the party may refuse to go on with the inventory or to file it if it is finished, and the result is that the person who may feel aggrieved has no remedy, because the statute imposes no penalty for failure to complete or file an inventory, and there can be no valid sale until both of these things are done.

And what must such an inventory contain? First, the quantity. That is usually and of itself entirely sufficient in the case of a sale in bulk. Second, the cost price to the seller of each article to be included in the sale, although the purchaser, one of the parties who must file an inventory, may have no means of knowing anything about the cost price to the seller. It is true that the latter feature of the inventory is only made necessary in so far as it is possible with the exercise of reasonable diligence. But the seller may have full knowledge on the subject, which he may decide not to disclose. The purchaser may know nothing about it, but his bargain can be annihilated by the seller's refusal to exercise the "due diligence" by which the information could be disclosed. Then, again, a purchaser may have a market for goods which he is willing to purchase at a specified price. This market he would lose if compelled to file a long and detailed inventory containing the cost price to the seller. And the inventory must be filed. While the statute does not designate the place of filing, it would be of no value unless in some place where the inventory would become public property. Such an inventory, moreover, is not only unnecessarily burdensome, but practically prohibitory of such sales. Not only the quantity of the goods sold, but the cost price of each article, must be given in detail. This requires a disclosure of the very secrets that make sales in bulk a business possibility, and entails upon the prospective contractors many details that in a given case may require weeks or months, and that neither may care to go into. In the case of a sale of the whole or any part of the stock of a great department store, for instance, the cost price to the seller of every paper of pins or fine tooth comb would have to be inventoried, although the producing cause of the sale might be based upon considerations that would utterly fail if such infinitesimal matters had to be taken into account.

The next requirement of the statute has to do with the purchaser alone. At least five days before the sale he must make full, explicit inquiry of the seller as to the name and place of residence or business of each of the seller's creditors, and of the amount owing to him, and, having done this, he must then notify or cause to be notified each of such creditors, personally or by registered letter, of the proposed sale and the stated cost price of the merchandise, as well as the price to be paid by the purchaser. In other words, the purchaser, who is under no legal or moral obligation to the seller's creditors, is not only required to obtain from the seller all these details concerning his creditors, but he must send to each one, no matter how great their number or how remote their places of residence or business, all the detailed information that is to be included in the inventory. Thus the inventory may have to be duplicated by the hundreds or thousands and sent to creditors scattered over all portions of the globe. It is true that this obligation rests upon the purchaser to the extent that it can be fulfilled in the exercise of reasonable diligence; but this qualification emphasizes, rather than mitigates, the arbitrary command of the statute. And, finally, the seller shall, at least five days before such sale, file a a truthful answer in writing to each and all of said inquiries. There is no intimation as to the place of filing, or as to what will happen if there is no filing. Neither are we informed as

to the effect upon the purchaser of the seller's failure to tell the truth or to file his written answers. In the midst of such a mass of detail it is refreshing to feel that this trifle is left to the imagination.

Let us emphasize the assertion that we do not question the power of the legislature to enact reasonable laws for the prevention of fraud and the protection of creditors. That this right falls within the general scope of the police power no one will deny. But the police power only begins where the constitution ends. Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarcation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the constitution has been trespassed upon. And when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised, or the evils which it was designed to correct. First the constitution, and then the police power. The statute under consideration sweeps away the constitutional rights of liberty and property of a limited class of our citizens who are entitled to the equal protection of the laws with all other citizens. It invades the right of liberty because it arbitrarily and unnecessarily denies the right of a specified class of citizens to contract for, bargain, and sell a particular kind of property. It violates the constitution in prohibiting all sales of merchandise in bulk, whether honest or dishonest, except upon conditions that are harsh, drastic, unreasonable and unnecessary, in so far as they do not tend to effectuate the objects for which such a statute may properly be enacted. It ignores the constitutional guaranty relating to property rights, because it so restricts the right of contract as to deprive property of its characteristics as such.

It is urged, however, that the impositions of this statute are more nominal than real, since a seller has only to pay his debts in order to make his sale valid. The argument, so far from supporting the statute, really serves to disclose one of its most sweeping and unreasonable features. If the statute affected none but insolvent sellers, or related merely to debts due, or gave to purchase price creditors an equitable lien for their respective shares of the proceeds of a proposed sale, or if, instead of interdicting in advance a sale in bulk, it had made some reasonable provision for impounding the proceeds of sale until the seller's legal obligations could be judicially ascertained, there might be some force in the suggestion. But what is the fact? The act embraces all sales of entire stocks of merchandise in bulk. It covers every sale of any part of a stock not made in the ordinary course of trade in the regular and usual prosecution of the seller's business. It requires notice to be given to all the seller's creditors, whether their debts are due or not, that a sale is contemplated. It requires this notice to be given five days in advance of a sale. It requires observance of every one of its details or payment of every creditor. What is the practical effect? A seller who is abundantly able to pay his debts is compelled by law to do so before he can dispose of a part of his possessions. He must pay his debts, whether they are due or not. He must pay them, whether they are in dispute or not. He must pay creditors, who have no legal, equitable, or moral claim upon the particular property or its proceeds. And if he depends upon the proceeds of the particular sale to pay his debts, he must pay them at least five days before he gets the money. Thus an intending seller is under the necessity of practically obtaining the consent of his creditors before he can make a sale. He must pay a claim that may be in dispute, right or wrong, and he must take what equitably belongs to the creditor for purchase price and pay it to general creditors, or he can be "held up." This may not be a literal taking of property without due process of law, but it is an annihilation of its value and a destruction of its attributes, so that, while the owner is permitted to retain his property in name, he is deprived of its essence and substance. Wynehamer v. People, *supra*.

It is said, also, that similar statutes, some of them much more drastic, have been adopted in 20 different states or jurisdictions. Twenty wrongs can never make one right. There is, moreover, a singular, not to say suspicious, coincidence in the time and substance of all this legislation. We are indebted to our Brother Bartlett for the suggestion that more than half of these statutes were enacted in 1903 and 1904, and nearly all of them since 1900. Statutes that are passed *pro bono publico* rarely sweep the country with such irresistible momentum, while much fantastic legislation has resulted from organized crusades upon legislatures by the advocates and supporters of special classes. The statute "is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors." Peckham, J., in People v. Gillson, 109 N. Y. 389, 17 N. E. Rep. 343, 4 Am. St. Rep. 465.

If we have succeeded in making our position plain, it will be unnecessary to answer in detail that portion of Judge Vann's very learned and able opinion in which he illustrates the manifold purposes for which the police power has been exercised by legislatures and upheld by courts. The existence of the power is not denied. Its limits cannot be accurately demarked. The well-beaten paths which it has pursued time out of mind contain no guideboard to the new and un-

trodden field sought to be explored by this particular phase of paternal legislation. Therefore old cases and old laws are of little help, except as they expound general principles applicable to special conditions. In its final analysis the question is one of power in this particular case. We think that power has been transcended. "To justify the state in interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Colon v. Lisk, 153 N. Y. 188, 47 N. E. Rep. 302, 60 Am. St. Rep. 609; Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. Rep. 499, 38 L. Ed. 385. It cannot be reiterated too often that the police power must be exercised within its proper sphere and by appropriate methods. Whenever a statute arbitrarily strikes down private rights, invades personal freedom, or confiscates or destroys private property, it is repugnant to the constitution, and should not be permitted to stand, no matter how laudable its purpose or beneficial its effect.

Owing to the length of this opinion, we refrain from discussing the cases decided in other states upon similar statutes, except to say that those which have been upheld in Massachusetts, Connecticut, Tennessee, and Washington are far less drastic than our own, in that they either except from their operation all sales by executors, administrators, receivers, etc., or provide that sales of merchandise in bulk shall only be presumptively void if the statutory requirements are not observed, or, as in Connecticut, that one day after the sale there shall be filed a descriptive writing duly signed and acknowledged. In Ohio and Utah, where such legislation was condemned by the courts, it was in some respects even more far-reaching and burdensome than here.

The judgment of the Special Term and Appellate Division should be reversed, and judgment ordered sustaining defendant's demurrer, with costs in all the courts. Question certified answered in the negative.

NOTE.—*Constitutionality of Statutes Prohibiting Sales in Bulk.*—This question has been discussed in previous issues of this journal, 59 Cent. L. J. 108, 114, and in the place referred to we have stated every point in favor of the unconstitutionality of the act that appeared to us unreasonable. The principal case is cumulative of that point but only makes the conflict of authority on this very interesting question more intense, as the record now shows about an equal number of courts holding to each side of the proposition of the constitutionality or unconstitutionality of the legislation here referred to. It will hardly be necessary for us to further annotate this question, but simply quote in full the careful, strong and learned argument of Vann, J., in the principal case. It may assist in a proper disposition of this troublesome question. Justice Vann's dissenting opinion is as follows: "The only question presented by this appeal is whether the statute regulating the sale of merchandise in bulk (Laws 1902, p. 1249, ch. 528) violates any provision of the statute or federal constitution. The object of the act was to suppress a widespread evil, well known to current history and condemned by repeated adjudications in this court and in all the leading courts of this state from time out of mind. That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors. Common observation shows that, when a dealer has reached a point in his business career where he cannot go on owing to the claims of creditors, the temptation is strong and the practice common of making a fraudulent sale. Fraud works in secret, and the bargain is closed and the purchaser in possession before the creditors know anything about it. The evil is difficult for the courts to handle, because the evidence to uncover the furtive scheme must, as a rule, be drawn from hostile witnesses, usually relatives or intimate friends of the seller, who took part in the fraud and shared in the plunder. All those who have had to do with the investigation of such transactions realize how well these frauds are protected by the forms of law and how frequently they are defended by perjury. The form of the fraud varies with the skill of the perpetrator and his advisers, but the unvarying purpose is to enable the debtor to hold and enjoy property which equitably belongs to his creditors. Inadequacy of consideration, absconding with the proceeds of the sale, and the preference of fictitious claims are familiar methods. Many other means of holding on to property and concealing the facts are resorted to, and it is not uncommon to see a dealer in possession of all that he had before he failed, and, acting under another name, carrying on the same business with the same stock, all unpaid for, in unblushing defiance of his creditors. Whatever the method of committing the fraud, its success depends on secrecy and perjury.

When a merchant owes more than he can pay he has no substantial equity in his stock of goods, and the claims of his creditors are superior to his own. The courts may not only prevent him from parting with his property, but may seize and sell it and apply the proceeds upon his debts. If an execution issued against his property is returned unsatisfied, he may be compelled to disclose under oath all his business transactions, tell what he has done with his estate, both real and personal, and the proceeds thereof, and, if he still holds any property in the name of some one else, to divulge all the facts relating thereto. Code Civ. Proc., §§ 2432, 2463. He may be imprisoned on civil process and punished criminally for making a fraudulent disposition of his property, and any person who is a party or privy to the fraud may be punished in the same way. Code Civ. Proc., § 649; Pen. Code, § 586. Interference with his liberty and property by such methods has never been successfully questioned as a violation of fundamental rights. Many restraints upon freedom of contract, some of which reach back to our colonial history, have passed without challenge, or if challenged, have uniformly been sustained as valid. The statute of frauds, the act to prevent fraudulent conveyances, insolvent laws, the recording act, the prohibition of usury, lien laws, regulations in relation to chattel mortgages, conditional sales and preferences by corporations and in

general assignment shows in how many ways and in what varied forms the legislature may properly restrain freedom of action in commercial transactions in order to promote the general welfare. Originally all parol contracts for the sale of personal property were valid, and it was unnecessary to make delivery or payment wholly or in part. The recording act was unknown, and transfers in writing, whether absolute or conditional, did not have to be filed. Now, however, many statutes require business to be transacted in a certain way and that constructive notice should be given in order to protect creditors and innocent purchasers. Such interference with liberty and such limitations upon the use of property, although arbitrary and inconvenient, have always been regarded as valid, in order to prevent fraud and promote justice. While commerce is hampered to a limited extent in some ways, it is protected and promoted to a much greater extent in other ways. The inconvenience of the restraint is less than the evil done away with.

The statute now before us was passed for the same general purpose as the most of those mentioned. It is aimed at the same evil, which is admitted to be both serious and common. It does not prohibit a sale of any kind, but it provides safeguards against secrecy, which is the bulwark of fraud. It simply requires that notice of what is to be done should be given in advance, personally or by mail, to those directly interested, who are frequently made the victims of fraudulent sales. It regulates two kinds of sales: (1) A sale of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business. (2) The sale of an entire stock of merchandise in bulk. We now have to deal with the latter only. Such a use is declared fraudulent and void, not absolutely, but as against the creditors of the seller, unless the statute is complied with. If the seller pays his debts, the sale stands, even if not made as required by the statute; but otherwise it falls unless at least five days before the date thereof both seller and purchaser unite in making a full and detailed inventory, showing the quantity and, so far as reasonable diligence will permit, the cost price of each article. This burden is cast upon both seller and purchaser; but a further burden is placed on the purchaser, who is required at least five days before the sale in good faith to make full and explicit inquiry of the seller as to his creditors and the amount owing to each, and to notify them personally or by mail of the proposed sale, the cost price of the stock to be sold, and the price proposed to be paid. At least five days before the sale the seller is commanded to file—where is not specified, but presumptively in the office where a chattel mortgage given by him should be filed—a truthful answer in writing to each inquiry made of him by the purchaser as above required. Except as thus specified, the rules of evidence and the presumptions of law are left unchanged. A recent amendment provides that a sale 'will be presumed to be fraudulent and void as against the creditors of the seller' unless the statute is complied with, while the act governing the case now before us makes such a sale absolutely void as to creditors. Laws 1904, p. 1385, ch. 569.

The statute is confined to merchants and dealers, as is apparent from the use of the expressions 'a stock of merchandise' and 'the cost price to the seller.' No sale is forbidden, but certain sales are regulated, in order to prevent fraud. No restraint is placed upon sales made in the ordinary course of business, whether at wholesale or retail; for the statute applies only to unusual and extraordinary sales. There is no attempt to regulate sales generally, but merely those which experience shows are so frequently made a cover for fraud. There is no interference with the ordinary business of merchants, but when they sell their entire stock and go out of business, or sell any substantial portion thereof in an irregular and unusual way, notice to creditors is required, so that they can protect themselves against fraud. No protection is afforded to strangers, but simply to those who have a strong equitable right to see that the sale is for a fair price and free from fraud. If the merchant pays his debts, there can be no attack upon the sale, however made. The act is less drastic than one imposing a lien upon goods sold until the purchase price is paid, with the right to discharge the lien by sales in the ordinary course of business, which is clearly within the power of the legislature. The requirement of notice is less burdensome than the imposition of a lien. While the statute in question disturbs freedom of contract, so does fixing the price of elevating grain (People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77), the prohibition of options to buy or sell grain at a future time (Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425, 46 L. Ed. 623), and the annulment of all contracts for the sale of corporate stocks for future delivery or on margin. Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. Ed. 323. It interferes with the use of property; but so does a limitation upon the height of buildings (People v. D'Oench, 111 N. Y. 359, 18 N. E. Rep. 862), the requirement that tenement houses shall be furnished with water (Health Dept. of New York v. Rector, etc., Trinity Church, 145 N. Y. 32, 39 N. E. Rep. 833, 45 Am. St. Rep. 579), forbidding the sale of stamped bottles (People v. Cannon, 139 N. Y. 32, 34 N. E. Rep. 759, 36 Am. St. Rep. 668), or of lottery tickets issued in a state where lotteries are lawful (People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128), or of game purchased in another state as lawful merchandise and brought into this state. People v. Bootman, 180 N. Y. 1, 72 N. E. Rep. 505. It interferes with liberty; but so does the act 'to regulate barbering on Sunday' (People v. Havnor, 149 N. Y. 195, 43 N. E. Rep. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. Rep. 666, 44 L. Ed. 716), the statute making it a misdemeanor to exhibit a child as a dancer in order to earn a living (People v. Ewer, 141 N. Y. 129, 36 N. E. Rep. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788), the exclusion of children not vaccinated from school (Matter of Viemeister, 179 N. Y. 235, 72 N. E. Rep. 107, 103 Am. St. Rep. 859); and the compulsory vaccination of all the inhabitants of a community. Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. Ed. 643.

Twenty states, as well as the federal government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal. California: Civ. Code, § 3440, as amended March 10, 1903 (St. 1903, p. 111, ch. 100). Colorado: Sess. Laws, 1903, p. 225, ch. 110. Connecticut: Pub. Acts 1903, p. 49, ch. 72. Delaware: Laws, 1903, p. 748, ch. 387. District of Columbia: 33 Stat. 555, ch. 1809; Acts 58th Cong. April 28, 1904. Georgia: Laws 1903, p. 92, No. 457. Idaho: Laws 1903, p. 11, H. B. 18. Indiana: Acts 1903, p. 276, ch. 153. Kentucky: Acts 1904, p. 72, ch. 22. Louisiana: Acts 1896, p. 137, No. 94. Maryland: Laws 1900, p. 907, ch. 579. Massachussetts: Acts and Resolves 1903, p. 389, ch. 415. Minnesota: Gen. Laws 1899, p.

357, ch. 291. Ohio: Laws 1902, p. 96, H. B. 334. Oklahoma: Sess. Laws 1903, p. 249, ch. 30, Oregon: B. & C. Comp. p. 1479, ch. 7. Tennessee: Acts 1901, p. 234, ch. 133. Utah: Laws 1901, p. 67, ch. 67. Virginia: Act approved January 2, 1904: Acts 1902-04, p. 884, ch. 554 (Va. Code 1904, p. 1217, § 2460a). Washington: Laws 1901, p. 222, ch. 109. Wisconsin: Laws 1901, p. 684, ch. 463. A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee and Washington. J. P. Squires & Co. v. Tellier, 185 Mass. 18, 69 N. E. Rep. 312, 102 Am. St. Rep. 322; Walp v. Mooar, 76 Conn. 515, 57 Atl. Rep. 277; Neas v. Borches, 109 Tenn. 398, 71 S. W. Rep. 50, 97 Am. St. Rep. 851; McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 71 Pac. Rep. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889. An act declaring such sales presumptively fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland. Fisher v. Herrmann, 118 Wis. 424, 95 N. W. Rep. 392; Hart v. Roney, 93 Md. 432, 49 Atl. Rep. 661. On the other hand, a statute with more exacting conditions was held unconstitutional in Ohio (Miller v. Crawford, 70 Ohio, 207, 71 N. E. Rep. 631), and a similar act met the same fate in Utah, where a violation of the statute was made a crime. Block v. Schwartz, 27 Utah, 387, 76 Pac. Rep. 22. The weight of authority, thus far announced, is in favor of the validity of such legislation. The general grounds upon which it has been sustained are well illustrated by the following extract from the opinion of the Supreme Court of Massachusetts: 'A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts. The legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property and the general right of creditors to be paid and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question. The object of it is like that of our numerous statutory provisions which authorize attachments on *mesne* process and establish courts with all the necessary machinery for the collection of debts. The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and to receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it.' J. P. Squires & Co. v. Tellier, 185 Mass. 18, 20.

The question before us is one of power, not of policy. Courts may pass upon the power of the legislature, but not upon its policy. Statutes, whether wise or unwise, are equally binding upon us, provided no provision of either constitution is molested. According to the general rule, unless there is a plain conflict between a statute and the constitution, the statute stands, for every presumption is in its favor. The respect due to a co-ordinate branch of the government will not permit mere judicial doubt to undermine a statute, for there must be clear judicial conviction that it violates the constitution before the courts can set it aside. The legislature, with all the power of legislation there is, may pass any law upon any subject, unless it is expressly or impliedly forbidden by the supreme law of the state or of the United States. There is a power beneath the constitution, but not superior to it, unwritten, not fully defined, necessary, resting on the sovereignty of the state, which exists because the state cannot exist without it, and which must be considered in connection with the constitution. That power, known as the 'police power,' aims to promote the public welfare by compulsion and restraint, and it is under the exclusive control of the legislature. The executive department can exert it only as authorized by the legislature. The courts can neither exercise it, nor prevent its exercise, but they can determine whether a statute is a constitutional use of the power. We cannot overturn a statute because we do not like it; for our likes and dislikes affect us as citizens, not as judges. We greatly prefer the amended act to the original, because, although effective, it is not so harsh; but that has nothing to do with the validity of either.

Starting always with the presumption that the statute, although challenged, is valid, we study it in connection with the constitution, to see whether there is such a conflict as to divest the legislature of jurisdiction. If purporting to be passed in the exercise of the police power, we endeavor to see, first, whether there was an evil to be remedied, and, second, whether the remedy prescribed is 'calculated, intended, convenient, or appropriate' to suppress it, and not designed to trespass upon personal rights 'under the guise of a police regulation.' If 'the act has a fair, just, and reasonable relation to the general welfare,' it may so regulate the 'conduct of an individual and the use of property' as to 'interfere to some extent with the freedom of the one and the enjoyment of the other.' If it violates no express command of the constitution, and tends 'in a degree that is perceptible and clear towards the preservation of the lives, the health, the morals, or the welfare of the community, as those words have been used and construed in many cases heretofore decided,' and is not passed 'ostensibly in favor of the promotion of some such object, while really it is an evasion thereof and for a distinct and totally different purpose,' it comes within the jurisdiction of the legislature, and the courts are bound to sustain it. The police power cannot be arbitrarily exercised, so as to deprive the citizen of his liberty or property, 'but a statute does not work such a deprivation, in the constitutional sense, simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the constitution was adopted.' Liberty under the constitution does not mean natural liberty, or the right to act as one pleases, subject only to the laws of nature; for society cannot exist on that basis. Constitutional liberty is the right to act without restraint upon person or property, except such as is necessary or expedient for the general advantage of the pulic. Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 2 N. E. Rep. 29, 52 Am. Rep. 34; People v. Arensberg, 105 N. Y. 123, 11 N. E. Rep. 277, 59 Am. Rep. 483; People v. Gillson, 109 N. Y. 389, 17 N. E. Rep. 343, 4 Am. St. Rep. 465; People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; Health Dept. of New York v. Rector, etc., Trinity

Church, 145 N. Y. 32, 39 N. E. Rep. 833, 45 Am. St. Rep. 579; Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. Ed. 923; Gas Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. Ed. 516.

The legislation under consideration was intended to suppress a deep-seated evil, common in sales of a certain kind. The existence of the evil is admitted, and the right of the legislature to provide a remedy is also admitted; but it is insisted that the remedy provided is so unreasonable that it violates the primary guaranties of the constitution. The same claim was made when a maximum price was fixed for doing a certain kind of work; but it was rejected, because the work was done in a business affected with a public interest. People v. Budd, *supra*. The same position was taken when one state absolutely prohibited sales on margain and another options to buy or sell at a future time, contracts which were previously valid; but both provisions were sustained by the Supreme Court of the United States, because they tended to prevent gambling. Booth v. Illinois, *supra*, and Otis v. Parker, *supra*. While many contracts of the kind prohibited were free from wrong, as so many were made for the purpose of gambling, all were swept away, the good and the bad alike. Is gambling a worse evil than fraud? Does it affect commerce more seriously? Is freedom of contract interfered with more by requiring notice to creditors before certain sales are made than by forbidding certain other sales altogether? The statute is intended to interfere only with those who buy and sell in bad faith toward the creditors of the vendor. It doubtless interferes with some who act in good faith, but so do the other statutes referred to. In order to prevent injustice and fraud, legislation for time out of mind has placed some restraint upon commercial transactions, and where the legislature has jurisdiction to act the method of suppressing the evil is wholly within its sound discretion.

The right to pass laws to prevent fraud being conceded, what principle is to guide us in drawing a line to separate the act before us from those considered in the cases cited! How can we declare this statute void and the others valid? It has no ulterior purpose. No attempt is made to protect some favored interest from injurious competition. Its object is not, as in the Gillson Case, to interfere with a lawful business, but to prevent one man from keeping property which equitably belongs to others. It seeks to maintain justice, which is one of the leading features of the public welfare. The protection of creditors has always been a primary function in the administration of justice. Why should the constitution require courts to be maintained to punish fraud and yet deprive the legislature of power to prevent fraud by requiring notice to a class apt to be defrauded? As it is known that dishonest merchants abuse freedom of contract by secretly selling out in such a way as to defeat the claims of creditors, may not the legislature surround the right with some safeguards, such as an inventory and notice thereof? When the end sought is within the domain of legislation, and the form of the remedy proposed is fairly adapted to that end, the courts have no power to interfere. When jurisdiction exists, the details are within the exclusive control of the legislature. While a merchant, owing debts, has an absolute constitutional right to sell his stock of goods, he may properly be required to do something for the protection of his creditors, and what he shall do is for the legislature to prescribe. With power to act upon the subject, it may pass a foolish statute or a wise one; and we cannot overturn the one unless we can the other. It is only when there is a want of power to legislate that the courts can declare a statute void.

It is insisted, and the argument is not without force, that while the provisions of the act, so far as they relate to the vendor, may be valid, the restraint upon the purchaser is so severe as to impinge on the right of liberty and property. What is required of the purchaser? To some extent he must look after the interests of creditors, if there are any. He must either see that they are paid or notify them in advance of what is to be sold, the price paid and to be paid, and must ask the seller who his creditors are. If there are no creditors, the statute does not apply. If the inquiry, when carefully made, discloses no creditors, and the purchaser knows of none, he may buy in safety without the inconvenience of inventory or notice. If there are creditors, the risk is in proportion to the amount of their claims, and, whether it is large or small, they have rights which need protection from a sale made in bad faith; and it is at such sales that the statute strikes. The purchaser may be buying property in which the seller has less real interest than his creditors, and it is reasonable to charge both seller and purchaser with the exercise of some care toward them, in the interest of justice and the general welfare. The inconvenience to purchasers is an evil, as it hampers commerce to some extent: but the injury to commerce from fraudulent sales is a much greater evil, so that on the whole commerce is not harmed, but helped. The legislature had the right to balance these evils, and to promote the common good by trying to do away with the greater. The everyday business of the seller and buyer is not touched, for that is outside of the statute; but when an extraordinary sale is made, such as can occur but few times in the life of a merchant, certain conditions and restraints are imposed, not to hamper business, but to prevent secret sales in bulk of property usually bought on credit and generally unpaid for when the sale is made. The remedy provided tends to furnish the protection needed by creditors, without any interference whatever with ordinary business, and without disturbing freedom of contract in the rare and irregular cases to which the act applies any more than was within the power of the legislature according to the principles laid down by repeated adjudications in this court and in the Supreme Court of the United States. Purchasers who complain of the act as a violation of their constitutional rights are themselves protected by legislation equally drastic; for they could not purchase in safety, were it not for the acts in relation to chattel mortgages and conditional sales. They might purchase and pay in good faith, and yet have the property taken away from them under a lien they knew nothing about and which they could not discover. As the legislature passed these acts, it can repeal them; and in that event purchasers, however careful, might not get a good title, while now, even with the act under consideration in full force, they can get a good title if they only take pains. They cannot, therefore, consistently object to such a statute. They cannot in fairness assert that interference with an unlimited right of contract is constitutional when it operates in their favor, but unconstitutional when it operates in favor of creditors and against themselves.

It is also claimed that an unreasonable burden is imposed upon a limited class of debtors for the benefit of a limited class, consisting of their creditors. A statute which is uniform in its effect upon all persons o whom it applies is not invalid because it applies to

a limited number. This act applies to all the people of the state who carry on a certain kind of business which presents special temptations and opportunities for the commission of fraud. The classification is not arbitrary, but is founded on a 'reasonable and just difference between the persons affected and all others.' The difference is seen in the nature of a business conducted largely on credit, which, as shown by the records of our courts, furnishes peculiar facilities for the perpetration of a characteristic fraud. As was by said Mr. Justice Brewer in a late case: 'It is within the undoubted power of the government to restrain some individuals from all contracts as well as all individuals from some contracts.' Frisbie v. United States, 157 U. S. 160, 165, 15 Sup. Ct. Rep. 586, 588, 39 L. Ed. 657. And by Mr. Justice Field in an earlier case: 'Special burdens burdens are often necessary for general benefits. * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions." Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. Rep. 357, 359, 360, 28 L. Ed. 923. 'The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions.' Soon Hing v. Crowley, 113 U. S. 703, 709, 5 Sup. Ct. Rep. 730, 733, 28 L. Ed. 1145. The constitution means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; Moore v. Missouri, 159 U. S. 673, 678, 16 Sup. Ct. Rep. 179, 181, 40 L. Ed. 391.

I close my review by repeating as applicable generally to the case before us the words of the Supreme Court of the United States in a decision of great importance: 'The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, * * * yet in many cases of mere administration the responsibility is purely political; no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.' Powell v. Pennsylvania, 127 U. S. 678, 685, 8 Sup. Ct. Rep. 992, 996, 32 L. Ed. 253, citing Yick Wo v. Hopkins, 118 U. S. 370, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220."

CORRESPONDENCE.

JURISDICTION OF SUITS AGAINST A FOREIGN CORPORATION BY NON-RESIDENTS ON CAUSES OF ACTION ARISING IN ANOTHER STATE.

Editor of the Central Law Journal:

May I take the liberty, in the interests of jurisprudence, of saying a word in regard to the note in your issue of March 17th, 1905 (Vol. 60, No. 11, p. 211), commenting on the decision in Reaves v. Southern Ry. Co., Supreme Court of Georgia (decided January 27th, 1905), 60 Cent. L. J., p. 209? The head note is, "Note—Jurisdiction of Suits Against a Foreign Corporation by Non-Residents on Causes of Action Arising in Another State."

I would not, in an ordinary case, make any comment on an editorial note of your valuable journal, but it is because your influence is so great and far-reaching, that I ask whether you have not inadvertently been led into error? I have recently had a case in the Supreme Court of Louisiana in which I had occasion to refer to Cooper v. Ferguson, 113 U. S. 727, 739 (28 Lawyers' Edition 1137, bottom paging), where it was held that the making, in Colorado, of a contract by an Ohio corporation, whereby it agreed to build and deliver, in Ohio, machinery which the Colorado party agreed to pay for, did not constitute a carrying on of business in Colorado.

In this case it is clearly set forth, especially in the concurring opinions, that Colorado, by her constitution and laws, could not authorize by substituted service the impleadment of a foreign corporation, on a cause of action which arose in another state, where the contract was to be executed, and that the enactments of Colorado, if so construed, would be in violation of the interstate commerce clause of the constitution of the United States. The reasoning, of course, did not apply to insurance contracts.

We are all to liable to err, but as far as I can judge, the Georgia decision, and the note in your journal are in conflict with the decision in Cooper v. Ferguson, which has been recognized and followed in states, the decisions being referred to in United States Supreme Court Reports (Lawyers' Edition, Vol. 28, p. 1137), being Rose's notes on said decision.

Will you kindly let me know at your convenience, why no reference is made to the case of Cooper v. Ferguson, in your note above referred to?

S. S. PRENTISS.

New Orleans, La.

[We thank our correspondent for his kind words of appreciation and have given careful attention to his criticism of our position in the annotation referred to. We acknowledge that there are two sides to this controversy as there are to so many questions of jurisprudence, but after a careful re-examination of the question referred to in his criticism, we are not yet convinced that our position in the aforesaid annotation is untenable.

The simple question is, "Can a foreign corporation be sued in a state other than that of its incorporation by a non-resident of the state where suit is commenced?" Suppose, for instance, a corporation in Chicago which has an office in St. Louis makes a contract with a man in Arkansas. Can the man in Arkansas sue the Chicago corporation in St. Louis? The affirmative of this proposition is the one we maintained and cited cases to show that it is sustained by the weight of authority. We cannot see where the state of Missouri in permitting a citizen of Arkansas to sue a Chicago corporation in its courts violates any right of congress in its exclusive control of interstate commerce. The only point decided in the Cooper case, cited by our correspondent, is that a foreign corporation cannot be said to be "carrying on business" in another state where it contracts to sell to a citizen of such state a single article of commerce; and that, therefore, the failure of such corporation to take out a license in such state did not prohibit it from suing to recover on the contract it had made. To so prohibit it would have been an interference

with interstate commerce. It can hardly be contended that this is an authority for saying that a foreign corporation cannot be impleaded in a foreign state by a non-resident of such state, provided such nonresident obtains proper service on the corporation, either by serving a proper officer of the corporation, as he is passing through the state or by service on some agent of the corporation, duly authorized by the corporation to accept service of process. Jurisdiction is merely a question of finding; and what is true of personal defendants should also be true of corporation defendants. It is true the earlier authorities did not permit a foreign corporation to be sued outside the jurisdiction which incorporated it, but modern commercial enterprises centering so largely in the corporation form of doing business, makes it a practical necessity to extend the rule and compel corporation defendants to be subject to the same rules as personal defendants, so far as regards the question of service of process. If a corporation does not want to be sued in a foreign state, let it keep out of that state. Of course, a state cannot authorize the impleadment of a corporation on *substituted* service, except possibly, as to property having a *situs* in such state, but service on the president of a corporation as he is passing through a state or service on an agent duly appointed to accept service of process is not substituted service. Nor is there any good reason for denying to non-residents of a state the same privileges as to the commencement of actions against foreign corporations, that are permitted to resident plaintiffs. The question, however, is a new question, and the decisions are conflicting, so that it cannot be said that we have uttered the last word as to its final and proper solution. Editor].

BOOK REVIEW.

COOLEY'S BRIEFS ON INSURANCE.

Not since we examined for review the recent work of Prof. Wigmore on the Law of Evidence has our examination of any recently published law text book been so great a delight, as our perusal of the recent work of Mr. Roger W. Cooley, entitled "Briefs on the Law of Insurance." What is specially attractive about this new work is its novelty of arrangements, the freshness and peculiar clearness of its style and its absolute accuracy of statement and citation. A word first as to its arrangements. It is not a treatise in the ordinary acceptation of that term. It is, as its name implies, a series of briefs on all the important and difficult questions of the law of insurance, arranged in a logical sequence as to subject-matter. The thing that distinguishes this form of law text book from the ordinary kind is, that while it discusses every case from original principle, it wastes not space nor time in the study of purely academic and historical features of the law. It also avoids long discussions of elementary principles and presumes that the lawyer is fully acquainted with such principles. It is evident from this brief statement that this work is prepared rather for the active practitioner than for the law student. Its five volumes of careful text and exhaustive citation of authorities is not padded and wasted with the discussion of questions which no lawyer in the course of an active practice would have occasion to investigate. It is rather a series of briefs on live topics of the law, minutely subdivided, and each minute subdivision so exhaustively treated as to be a complete brief on that particular point. Herein lies the greatest value of this new work. The second point of excellence to be observed is its freshness and peculiar clearness of style. There is an absence of all the usual conventionalities of legal diction; the style is rather that of the advocate than the judge. It is not ponderous, but rather has a sharpness and zest that enables it to engage the attention of the reader while it thrusts in deep and firm the point it seeks to prove. There is no ambiguity. To fail to understand the style of this work is to acknowledge incompetency to understand the English language. The third point of superiority, to which we have already called attention, is the accuracy with which the author carefully frames the statements of his general principles of law and its absolute exhaustiveness and accuracy of citation. In every legal text book both these points are always of supreme importance. One without the other detracts seriously from the merits of the work from a practitioner's standpoint. A legal work on which a practitioner is expected to rely, must have all the cases in order to give the attorney complete confidence. But of even greater importance is it that the citations should be accurate. There have been many law books whose authors have prided themselves on the fact that they cited so many thousands of citations more than any other work, without at the same time offering a guarantee to the profession that every citation is directly in point. Of what value is a hundred cases cited to a given proposition, when the first one examined is found to be undecisive of the point of law to which it applies and the confidence of the practitioner is shaken in the rest of the 99 citations. On this point, however, the author of the work under review offers the following guarantee: "There has been a conscientious endeavor to exhaust the cases. To this end not only have the cases cited by the courts in their opinions been examined to determine the origin of the principle or exception, but the subsequent history of each case has been traced by means of tables of cases cited, distinguished and overruled. Great care has been exercised to cite only cases which are directly in point with the proposition under consideration. Instead of relying on the citations of the text books, cyclopedias or digests, the author has satisfied himself by careful examination and analysis of the opinions, that each case cited to a proposition involves the particular principle under discussion." Altogether, our examination of every feature of this work has convinced us that it is the greatest and most important work on the subject of insurance ever published, and as such we commend it to the profession.

Printed in five large volumes, bound in law sheep and published by the West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Cases on Quasi-Contracts, Edited with Notes and References. By James Brown Scott, Professor of Law in Columbia University. New York. Baker, Voorhis & Company, 1905. Canvas, pp. 788. Price $3.50. Review will follow.

An Essay on the Principles of Circumstantial Evidence, Illustrated by Numerous Cases, by the Late William Wills, Esq., Justice of the Peace. Edited by his son, Sir Alfred Wills, Knt., one of his Majesty's Judges of the High Court of Justice. Fifth English

Edition (1902). With American Notes, by George E. Beers, of the New Haven Bar, of the Faculty o the Yale Law School; and Arthur L. Corbin, of the Faculty of the Yale Law School. Boston, Mass. The Boston Book Company, Law Publishers, 1905 Sheep, pp. 461. Price $5.00. Review will follow.

HUMOR OF THE LAW.

When Senator "Joe" Blackburn went into the office of a celebrated lawyer of Kentucky to study law he was surprised by the absence of a library.

"Where's the library?" he asked.

"Now, Joe, if you want to study law don't begin by asking questions," the old lawyer told him. "There isn't any library. You see that book. That's the statutes of Kentucky and it's all the library any lawyer needs. Don't get a library if you want to become a lawyer; it will only worry you."

"I've found that advice was the best I ever received, too," the Senator added.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Time for Revival.—Under Kirby's Dig., §§ 6314, 6315, where more than a year has elapsed since the order to revive might have first been made a motion to dismiss the appeal must be sustained.—Anglin v. Cravens, Ark., 88 S. W. Rep. 833.

2. ABSENTEES—Jurisdiction —The mere fact that, in an action against two defendants domiciled beyond the territorial jurisdiction of the court of first instance, jurisdiction is acquired as to one, held not to authorize the bringing of the other into court by the appointment and motion of a curator *ad hoc*.—West v. Lehmer, La., 38 So. Rep. 969.

3. ABSENTEES—Seizure of Property.—Absentees can be brought into court on a demand for a money judgment only by an actual seizure of property in the suit in which the demand is made.—Levy v. Collins, La., 38 So. Rep. 966.

4. ACTION—Misjoinder of Causes.—The husband's right of action for funeral expenses paid by him on the wrongful death of his wife cannot be joined with an action on behalf of the minor child of the husband and wife for the death of his mother.—Johnson v. Seattle Electric Co., Wash., 81 Pac. Rep. 705.

5. ADVERSE POSSESSION—Unincorporated Religious Society.—Where an unincorporated religious society had claimed and occupied land in controversy for more than 30 years, it would be presumed that the lost deed, under which it claimed title, conveyed the land to trustees for the society's benefit.—Penny v. Central Coal & Coke Co., U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 769.

6. APPEAL AND ERROR—Bill of Exceptions. — Where charges are copied in the reord, but neither the charges nor rulings thereon are shown by the bill of exceptions, the court's action upon the charges cannot be reviewed.—Milner Coal & R. Co. v. Wiggins, Ala., 38 So. Rep. 1010.

7. APPEAL AND ERROR—Failure to Give Instructions.—Complaint cannot be made of a failure to give instructions on the burden of proof and credibility of witnesses, when no request was made therefor.—Carpenter v. Jones, Ark., 88 S. W. Rep. 871.

8. APPEAL AND ERROR—Record.—On appeal from a judgment without a statement or bill of exceptions, nothing belongs to the record outside of the judgment roll.—Williams v. Boise Basin Mining & Development Co., Idaho, 74 N. E. Rep. 646.

9. APPEAL AND ERROR—Right of Appeal.—No appeal can be prosecuted, unless such right is shown by statute.—Cain v. State, Ind., 74 N. E. Rep. 1102.

10. APPEAL AND ERROR—Trial De Novo.—A suit in equity is before the supreme court on appeal for examination *de novo*.—Mack v. Mack, Wash., 81 Pac. Rep. 767.

11. ATTACHMENT—Redelivery Bond.—Where a redelivery bond in attachment was executed to the receiver of a corporation, his successors and assigns, a termination of the receivership did not discharge the surety from liability on the bond.—American Surety Co. v. Campbell & Zell Co., U. S. C. C. of App., First Circuit, 138 Fed. Rep. 531.

12. ATTORNEY AND CLIENT—Compensation.—In an action on an alleged contract to give plaintiffs certain stock in payment for legal services, any error in permitting recovery on the basis of a certain capitalization held harmless as to defendant.—Werner v. Knowlton, 94 N. Y. Supp. 1054.

13. BANKRUPTCY — Buildings on Leased Ground. — Where a bankrupt constructed an addition to a building on leased ground, whether the building was a fixture as against the landlord could not be determined, in advance of a sale of the bankrupt's assets and an attempt to sever.—*In re* Gorwood, U. S. D. C., M. D. Pa., 138 Fed. Rep. 844.

14. BANKRUPTCY—Discharge.—Under Bankr. Act 1898, ch. 541, § 7, a bankrupt held absolutely required to attend the hearing of objections to his application for a discharge before the referee on the demand of the objecting creditors.—*In re* Shanker, U. S. D. C., M. D. Pa., 138 Fed. Rep. 862.

15. BANKRUPTCY—Legal Services Where Trustee is an Attorney.—A trustee of a bankrupt, though an attorney, is not bound to perform legal services; but, if he does so, he cannot have additional compensation therefor from the estate.—*In re* McKenna, U. S. D. C., N. D. N. Y., 137 Fed. Rep. 611.

16. BANKRUPTCY—Mortgaged Property.—A bankrupt's trustee held entitled to refuse to take possession of mortgaged property, if its value did not exceed the lien, or sell the same for the benfit of general creditors after satisfying such lien.—*In re* Jersey Island Packing Co., U. S. C. C. of App., Ninth Circuit, 138 Fed. Rep. 625.

17. BANKRUPTCY—Petition to Review Order of Distribution.—A petition of a creditor to review a referee's

order of distribution as to commissions allowed the trustee, filed long after the time fixed therefor by rule of court, and after the commissions have been approved at a creditors' meeting and paid, will not be entertained.—*In re* Scherr, U. S. D. C., E. D. Pa., 138 Fed. Rep. 695.

18. BANKRUPTCY—Pleading.—An affidavit of defense, in an action by a trustee in bankruptcy to recover the value of property alleged to have been preferentially transferred by the bankrupt, held insufficient.—American Lumber & Mfg. Co. v. Taylor, U. S. C. C. of App., Third Circuit, 137 Fed. Rep. 321.

19. BANKRUPTCY—Referee's Rulings.—A referee in bankruptcy, on ruling that certain questions which a witness refused to answer, etc., were improper, held not bound, at the request of one of the parties, to certify the witness' alleged contempt to the court for decision.—*In re* Romine, U. S. D. C., N. D. W. Va., 138 Fed. Rep. 837.

20. BANKRUPTCY—Validity of Claims.—Where the validity of the claim of a petitioning creditor in involuntary bankruptcy proceedings is put in issue by the bankrupt's answer, and the issue is heard upon evidence and determined in favor of the creditor, such adjudication is conclusive upon the bankrupt and all other creditors.—Ayers v. Cone, U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 778.

21. BILLS AND NOTES—Fraud as Against an Innocent Purchaser.—Defendant held not negligent in signing a negotiable note in the belief that he was signing something else, and not liable thereon at suit of a *bona fide* holder.—Home Nat. Bank v. Hill, Ind., 74 N. E. Rep. 1086.

22. BILLS AND NOTES—Rights of Purchaser.—A person holding a promissory note, payable to the order of the maker and indorsed by her, may be presumed, as between the owner and the public, to be the owner, or to have power as agent to dispose of it.—Theard v. Gueringer, La., 38 So. Rep. 979.

23. BILLS AND NOTES—Transfer by Delivery.—A note to the order of the maker is payable to bearer and transferable by mere delivery, when indorsed in blank before maturity, with intent to pass title.—Meyer v. Foster, Cal., 81 Pac. Rep. 402.

24. BREACH OF THE PEACE—What Constitutes.—A village marshal held not a person whose peace could be disturbed by loud and offensive talking, within a village ordinance providing that, if any person disturbs the peace of another, etc., he shall be adjudged guilty of a misdemeanor.—Village of Salem v. Coffey, Mo., 88 S. W. Rep. 772.

25. BURGLARY—Evidence Showing Intent.—In a prosecution for burglary, certain testimony held admissible to identify defendant as the burglar, and to show the intent with which the burglary was committed.—Johnson v. State, Tex., 88 S. W. Rep. 813.

26. CARRIERS—Excessive Charges.—A lessor railroad company held not personally liable for a violation of the interstate commerce act by its lessee in participating in a discriminating through oil rate during the continuance of the lease.—Western New York & P. R. Co. v. Penn Refining Co., U. S. C. C. of App., Third Circuit, 137 Fed. Rep. 843.

27. CARRIERS—Failure to Furnish Cars.—A shipper cannot recover special damages arising from a railroad company's failure to furnish cars, unless the facts leading to the special damages are made known to the company.—Choctaw, O. & G. Ry. Co. v. Rolfe, Ark., 88 S. W. Rep. 970.

28. CARRIERS—Injury to Employee Riding on Work Train.—A servant employed by a railroad company, and riding home after the day's work on a work train, is an employee, and not a passenger.—Southern Indiana Ry. Co. v. Messick, Ind., 74 N. E. Rep. 1097.

29. CHATTEL MORTGAGES—Enjoining Enforcement.—Complainant held entitled to restrain the enforcement of a chattel mortgage note on saloon fixtures on tendering to defendant the reasonable value of such fixtures.—O'Brien v. Paterson Brewing & Malting Co., N. J., 61 Atl. Rep. 437.

30. COLLISION—Excessive Speed of Steamer.—The law makes no exception in favor of passenger steamers running regularly on schedule time on an established route, and for injuries resulting from excessive speed, in violation of the rules prescribed to insure safety to vessels and passengers, they must render compensation to the injured.—The Bellingham, U. S. C. C., W. D. Wash., 138 Fed. Rep. 619.

31. CONSTITUTIONAL LAW—Delegating to City Certain Legislative Powers.—Granting to city of power to pass ordinances for the protection of citizens is not an infringement of the maxim that legislative power may not be delegated.—Sluder v. St. Louis Transit Co., Mo., 88 S. W. Rep. 648.

32. CONSTITUTIONAL LAW—Ex Post Facto Law.—Acts 1903, p. 32, making a married woman a competent witness against her husband in certain cases, is not objectionable as an *ex post facto* law.—Wester v. State, Ala., 38 So. Rep. 1010.

33. CONSTITUTIONAL LAW—Limiting Lien of Judgment.—2 Ballinger's Ann. Codes & St., §§ 5148, 5149, limiting the lien of judgments to six years, and prohibiting revival proceedings, held unconstitutional not only as to judgments then existing, but as to existing contracts.—Williams v. Packard, Wash., 81 Pac. Rep. 710.

34. CONSTITUTIONAL LAW—Police Power.—It belongs to the legislature to determine primarily what measures are appropriate or needful to carry out the police duties of the state.—Equitable Loan & Security Co. v. Town of Edwardsville, Ala., 38 So. Rep. 1016.

35. CONSTITUTIONAL LAW—Retroactive Statute.—Rev. Codes N. Dak. 1899, § 3491a, providing for the creation of title by adverse possession of 10 years and payment of taxes, held not to deprive a person of his property without due process of law, who had 1 year and 7 months after the act's adoption to sue to recover his property.—Schauble v. Schulz, U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 389.

36. CONTRACTS—Construction.—Where, in an action for breach of contract, it appeared that both parties consented that the contract should be modified in event certain oil wells ceased to gush, and were not able to agree, the court could not make an agreement for them.—United Fruit Co. v. Louisiana Petroleum Co., La., 38 So. Rep. 958.

37. CONVERSION—Rights of Distributees.—Testator's distributees held to have acquired title to trust realty, as to which trustee's discretionary power of sale was not exercised, as remaindermen, which title vested as of the death of the testator.—*In re* L'Hommedieu, U. S. D. C., E. D. N. Y., 138 Fed. Rep. 606.

38. CORPORATIONS—Creditors Failing to Participate in Suit for Secret Profits.—Creditors of an insolvent corporation, not having participated in the furnishing of security for costs in suits brought by the receiver against promoters to recover secret profits under an order of the court, held not entitled to participate in such fund.—McEwen v. Harriman Land Co., U. S. C. C. of App., Sixth Circuit, 138 Fed. Rep. 797.

39. CORPORATIONS—Mismanagement of Officers and Directors.—In an action by a stockholder against the directors and officers of a corporation alleged to have fraudulently mismanaged its business, the corporation held entitled through plaintiff to an accounting and an injunction restraining defendant directors from further unlawful acts.—Glover v. Manila Gold Min. & Mill Co., S. Dak., 104 N. W. Rep. 261.

40. COURTS—Federal Decisions.—The decision of the Supreme Court of the United States, construing a state statute as in conflict with the interstate commerce act, is conclusive.—Spratlin v. St. Louis Southwestern Ry. Co., Ark., 88 S. W. Rep. 836.

41. COURTS—Validity of Act Creating Criminal Court.—An act creating a criminal court for a county is not void, because it imposes special duties on the sheriff and clerk of the court and incidental expenses of the county.—State v. Etchman, Mo., 88 S. W. Rep. 643.

42. CRIMINAL LAW—Oral Recognizance.—Burns' Ann. St. 1901, § 1784, to the effect that no recognizance, under-

taking, or bond taken in any criminal proceeding shall be void for want of form or substance, etc., has no application to such proceedings before a justice.—Cain v. State, Ind., 74 N. E. Rep. 1102.

43. CRIMINAL LAW—Presence of Defendant.—Where the record shows the presence of defendant in a criminal case, it will be presumed that he continued in court until the first adjournment.—Woodring v. Territory, Okla., 81 Pac. Rep. 631.

44. CRIMINAL TRIAL — Appeals to Race Prejudice.—Where, on trial of a negro for striking a white man, the district attorney appeals to race prejudice, the effect of such an appeal cannot be counteracted by instructions to disregard the same or by apologies to the district attorney.—State v. Bessa, La., 38 So. Rep. 985.

45. CRIMINAL TRIAL—Challenge of Juror.—Under the record on appeal in a prosecution for murder, held, that it was presumable that a juror was peremptorily challenged before he was sworn in chief.—Daniels v. State, Ark., 88 S. W. Rep. 844.

46. CRIMINAL TRIAL—Cross-Examination.—In a prosecution for burglary defendant held properly required to answer on cross-examination concerning his engagement and marriage and his failure to take his trunk from the house burglarized.—People v. Davis, Cal., 81 Pac. Rep. 716.

47. CRIMINAL TRIAL—Excusing Juror for Sickness.—The accused cannot complain that the judge has excused a juror for sickness or because a juror duly summoned has failed to appear.—State v. Voorhies, La., 38 So. Rep. 964.

48. CRIMINAL TRIAL—Instructions in Murder Case.—A person indicted for murder in the first degree and convicted of a lesser degree cannot complain of an instruction on murder in the first degree.—State v. Craig, Mo., 88 S. W. Rep. 641.

49. CRIMINAL TRIAL—Instructions as to Reasonable Doubt.—In a prosecution for murder, defendant held not entitled to object to an instruction that each and every fact and circumstance relied on to establish guilt must be proved by evidence beyond a reasonable doubt, etc.—People v. Olsen, Cal., 81 Pac. Rep. 676.

50. CRIMINAL TRIAL—Newly Discovered Evidence.—It is not an abuse of the trial court's discretion to refuse a new trial for newly discovered evidence which was merely cumulative.—People v. Davis, Cal., 81 Pac. Rep. 716.

51. CRIMINAL TRIAL—Remark of Court to Jury. — The remarks of the court, on refusing to receive the jury's verdict in a homicide case and directing them to retire, held not reversible error. — Ince v. State, Ark., 88 S. W. Rep. 818.

52. CUSTOMS DUTIES—Protest Against Tentative Liquidation.—The action of an importer in filing a protest against a tentative liquidation of an entry does not preclude him from filing another against the final liquidation, even though he had regarded the tentative liquidation as final at the time of his original protest.—United States v. Franklin Sugar Refining Co., U. S. C. C., E. D. Pa., 138 Fed. Rep. 677.

53. DAMAGES—Breach of Building Contract. — Where one who has contracted to erect buildings wholly fails to perform any part of his contract, the other party may recover damages, though he does not proceed with the erection of the buildings. — Simons v. Wittmann, Mo., 88 S. W. Rep. 791.

54. DAMAGES—Future Pain as an Element.—An allowance of damages for future pain and suffering to result from personal injuries should be confined to such damages as are reasonably certain to result from the injuries.—Waddell v. Metropolitan St. Ry. Co., Mo., 88 S. W. Rep. 765.

55. DIVORCE—Fraudulent Conveyance.—Where a husband, with notice that divorce proceedings are about to be commenced, conveys his property to a son by a former marriage to defeat a decree for alimony, the burden of proof is on the grantee to show a valuable consideration.—Bennett v. Bennett, Okla., 81 Pac. Rep. 682.

56. DIVORCE—Previous Provision for Wife's Support.—Where a wife had, in a suit for maintenance, obtained a decree for monthly payments, the granting of alimony to the wife in a subsequent suit for divorce by the husband held error.—Smith v. Smith, Cal., 81 Pac. Rep. 411.

57. EJECTMENT—Burden of Overcoming Legal Effect of an Acknowledgment.—In ejectment, the burden is on defendant to overcome the legal effect of an acknowledgment of a deed in plaintiff's chain of title.—Loyd v. Oates, Ala., 38 So. Rep. 1022.

58. EMINENT DOMAIN — Condemning Property for Union Depot.—Union depot company, with power to condemn land, may condemn that belonging to a non-stockholder, though certain of its stockholders have property suited to the purpose.—Riley v. Charleston Union Station Co., S. Car., 51 S. E. Rep. 485.

59. EQUITY—Demurrer Where Bill is Vague and Indefinite.—If a bill for relief is so vague and indefinite that it does not state any case upon which a court of equity will grant relief, it will be demurrable for want of equity.—Durham v. Edwards, Fla., 38 So. Rep. 926.

60. ESCROWS — Computation of Interest. — Times of payment of interest on note computed from the date of its execution and delivery to a depositary, and not from the date of its final delivery to the payee. — Bither v. Christensen, Cal., 81 Pac. Rep. 670.

61. ESTOPPEL—Abandonment of Street. — Though a citizen may by his conduct induce the authorities of a city to believe that he will not question the validity of an ordinance providing for the vacating of a public street, he will not be estopped from attacking the ordinance at any time before definite action is taken thereunder by the parties interested.—Coker v. Atlanta, K. & N. Ry. Co., Ga., 51 S. E. Rep. 481.

62. ESTOPPEL—Sale of Land.—Where party purchases a portion of a large tract by parol agreement, and enters into possession, and subsequently agrees that his vendor can sell the whole tract, including portion purchased by him, he is estopped to set up any claim as against the purchaser.—Pollock v. Pegues, S. Car., 51 S. E. Rep. 514.

63. ESTOPPEL—Validity of Franchise.—A municipality held not estopped from asserting the invalidity of a franchise.—Little Rock Ry. & Electric Co. v. City of North Little Rock, Ark., 88 S. W. Rep. 826.

64. EVIDENCE—Maps to Show Location of Objects.—A map made by commissioners in partition proceedings is admissible in evidence to identify the location of a bridge shown thereon.—*In re* Webster, 94 N. Y. Supp. 1050.

65. EVIDENCE—Market Price. — On the issue of the market price of goods sold, evidence of a sum realized by the seller on a resale is admissible, but is not conclusive.—Hardwick v. American Can Co., Tenn., 88 S. W. Rep. 757.

66. EVIDENCE—Past Transactions.—In an action for loss of plaintiff's horses hired to defendant, admissions or declarations of its agents against its interests, which were a historical narrative of past occurrences, were inadmissible.—Alden v. Grande Ronde Lumber Co., Oreg., 81 Pac. Rep. 385.

67. EVIDENCE—Testimony as to Charges in Books of Account.—The testimony of a witness as to an indebtedness, based upon his examination of charges made in books of account which were not made by him and are in no manner authenticated, is hearsay, and inadmissible.—Rosenthal v. McGraw, U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 721.

68. EVIDENCE—Usury. — An instrument reciting the execution of a note and the maker's agreement to transfer corporate stock to the payee held not to show necessarily usury in the transaction.—Cameron v. Fraser, 94 N. Y. Supp. 1058.

69. EXECUTORS AND ADMINISTRATORS—Cost of Tomb Stones.—On a petition of a legatee for immediate pay-

ment of her legacy, the court held not required to consider the amount that might be required for erecting tombstones as provided in the will.—*In re* Chesney's Estate, Cal., 81 Pac. Rep. 679.

70. EXECUTORS AND ADMINISTRATORS — Opening Decree of Distribution.—A decree opening proceedings in the son's estate not having been made until after the death of his father, neither his representatives nor assignees had any standing in court.—*In re* Lossee's Estate, 94 N. Y. Supp. 1082.

71. EXECUTORS AND ADMINISTRATORS—Publication of Notice for Sale of Land.—Order for the sale of lands of a decedent held not subject to collateral attack, though the proof of publication was made by the publishers as a firm.—Robbins v. Boulware, Mo., 88 S. W. Rep. 674.

72. EXECUTORS AND ADMINISTRATORS—Title of Executor to Choses in Action.—The executor has the full legal title to choses in action and debts due to deceased, and may release, compound, discharge, and transfer them.—Nance v. Gray, Ala., 38 So. Rep. 916.

73. EXEMPTIONS—Estoppel.—One in obtaining a judgment held not required to plead fraud of defendant in order to claim that defendant is estopped to claim property as exempt against the judgment. — McMahon v. Cook, 94 N. Y. Supp. 1018.

74. FALSE PRETENSES—Fraudulent Sales.—In order to constitute one guilty of swindling by means of a pretended sale of property, it is not necessary that the defrauded purchaser be involuntarily dispossessed of the property sold to him —Brown v. State, Tex., 88 S. W. Rep. 811.

75. FIRE INSURANCE—Breach of Warranty.—In an action on a policy of insurance, where nothing was shown to sustain the defense, based on alleged false and fraudulent warranties in the application, the issue was properly withdrawn from the jury. — Krell v. Chickasaw Farmers' Mut. Ins. Co., Iowa, 104 N. W. Rep. 864.

76. FIRE INSURANCE—Indorsements on Policy. — An indorsement on a policy of insurance must be considered in the light of the purpose actuating the parties in stipulating that the policy could be modified only in writing.—Atlas Reduction Co. v. New Zealand Ins. Co., U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 497.

77. FRAUD — Intent. — In action against real estate agents by plaintiff, who claims that they have sold certain lots by number and pointed out different lots of greater value, it is no defense that the agent acted through an honest mistake.—Dunham v. Smith, Okla., 81 Pac. Rep. 427.

78. FRAUDS, STATUTE OF—Agreement to Locate Mining Claim.—A parol agreement between plaintiff and defendant to locate and work mining claims for their joint benefit held not within the statute of frauds. — Mack v. Mack, Wash., 81 Pac. Rep. 707.

79. FRAUDULENT CONVEYANCES — Creditor's Lien.—A conveyance by a husband to his wife in payment of a debt due her could not be sustained as against judgment creditors on claims existing at the time of the transfers, where the amount due the wife did not clearly appear.—Tanner v. Eckhardt, 94 N. Y. Supp. 1013.

80. FRAUDS, STATUTE OF — Time and Place of Payment.—Where a contract for the sale of cattle fixed the price at a certain amount per pound, and made no other stipulation as to payment, the price was payable in cash at the time and place of delivery.—Darnell v. Lafferty, Mo., 88 S. W. Rep. 784.

81. HOMESTEAD—Sale of Fee for Deceased Husband's Debts.—The fee of the homestead of a widow is liable to sale, subject to her right, by order of the probate court, for payment of debts of the husband.—Robbins v. Boulware, Mo., 88 S. W. Rep. 674.

82. HOMICIDE — Indictment. — Where an indictment only charged murder in the second degree, the court was not called on to charge on murder in the first degree.—State v. Cummings, Mo., 88 S. W. Rep. 706.

83. HOMICIDE — Manslaughter. — Where, under the evidence, defendant was either guilty of murder or was not guilty, because of insanity, the court was under no duty to charge the law of manslaughter. — Braham v. State, Ala., 38 So. Rep. 919.

84. HOMICIDE—Necessity of Defining Self Defense.—The terms "self-defense" and "bring on difficulty," as used in the law of homicide, are self-explanatory, and need not be specifically defined in instructions.—State v. Bailey, Mo., 88 S. W. Rep. 738.

85. HUSBAND AND WIFE—Agreement to End Community of Acquets and Gains.—To a suit to set aside an agreement between husband and wife to put an end to the community of acquets and gains, though put in the form of a judgment, prescription does not apply.—Driscoll v. Pierce, La., 38 So. Rep. 949.

86. HUSBAND AND WIFE—Tenants by the Entirety.—Where a husband purchased property with his own funds and took the title in the name of himself and wife, they became tenants by the entirety.—Hayes v. Horton, Oreg., 81 Pac. Rep. 386.

87. INDEMNITY—Discharge of Liability. — Defendant held not discharged from liability on a contract to indemnify a surety on a forthcoming replevin bond by the surety's acceptance of notes of the sellers of the property to defendant, nor by his failure to pursue his remedy against them. — Waas v. Anderson, Conn., 61 Atl. Rep. 483.

88. INDICTMENT AND INFORMATION—Omission of Seal of Court.—The omission of the seal of the court to the jurat of the clerk does not invalidate the verification of an information.—State v. Forsha, Mo., 88 S. W. Rep. 746.

89. INSOLVENCY—Votes of Creditors.—Purchase from creditors of their claims under an agreement considered, and held, that it gave the purchaser the right to control the claims as owner.—Conery v. His Creditors, La., 38 So. Rep. 1005.

90. INTOXICATING LIQUORS—Exchange for Peaches as Constituting Illegal Sale.—Where an employee of the owner of a still delivered brandy in exchange for peaches and for the revenue license on the brandy, he was guilty of a sale of intoxicating liquor. — Barnes v. State, Tex., 88 S. W. Rep. 804.

91. INTOXICATING LIQUORS—Illegal Sales. — A liquor license affords no protection against a prosecution for the sale of liquor in a territory wherein such sale is prohibited by law.—Brame v. State, Ala., 38 So. Rep. 1031.

92. JUDGMENT — Vested Remainders.—The vested remainder to which one of testator's children was entitled under the will held charged with the lien of a judgment recovered against such child, which lien, in case of a sale of the property by the executor, attached to the proceeds thereof.—*In re* L'Hommedieu, U. S. D. C., E. D. N. Y., 138 Fed. Rep. 606.

93. JUDGMENT—Where Award is Greater than Relief Demanded.—A judgment held not objectionable, as awarding more relief than demanded, in so far as it awarded process for the enforcement of the judgment rendered.—White v. Wise, Cal., 81 Pac. Rep. 664.

94. JUSTICE OF THE PEACE—Appeal.—Circuit judge can dismiss appeal from magistrate for want of prosecution. —Equitable Fire Ins. Co. v. Fishburne, S. Car., 51 S. E. Rep. 528.

95. LANDLORD AND TENANT — Defective Building.—Where the roof of a building was defective, so as to accumulate a great weight of water, the fact that the falling of the roof was precipitated by its being struck by lightning did not excuse the owner from liability to a person injured by the fall of the roof.—Leithman v. Vaught, La., 38 So. Rep. 982.

96. LANDLORD AND TENANT—Oil and Gas Lease.—One purchasing leased land during the life of the lease occupies the same position as the original lessor.—Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, La., 38 So. Rep. 982.

97. LANDLORD AND TENANT — Tenant's Damage by Sale of Premises.—In an action by a tenant, on the landlord's refusal to deliver possession, the measure of damages was the difference between the agreed rental and

the rental value —Andrews v. Minter, Ark., 88 S. W. Rep. 822.

98. LIFE INSURANCE—Effect of Waiver of Forfeiture. —Where insurer waives a forfeiture, its liability becomes fixed by the death of insured, and his administrator need not tender performance in order to sue on the policy.—Washburn v. Union Cent. Life Ins. Co., Ala., 38 So. Rep. 1011.

99. LIFE INSURANCE—Nonpayment of Premium Note. —A forfeiture of an insurance contract for breach of conditions by insured takes place upon the occurrence of the breach on which it is based.—Washburn v. Union Cent. Life Ins. Co., Ala., 38 So. Rep. 1011.

100. LIFE INSURANCE — Warranties. — Statements by insured in his application, with reference to his family history as to consumption, and whether he had any serious illness within two years, were warranties.—Doll v. Equitable Life Assur. Soc., U. S. C. C. of App., Third Circuit, 138 Fed. Rep. 705.

101. LIMITATION OF ACTIONS — Partial Payments. — Where the last payment on a note was made within five years after the note became due, a suit brought within five years after such payment was not barred by limitations.—Brown v. Fuller, Ark., 88 S. W. Rep. 838.

102. MASTER AND SERVANT—Brakeman Assuming Risk. —An experienced brakeman, who, in violation of rules and specific instructions, unnecessarily goes between moving cars, assumes the risk —Moore v. St. Louis, I. M. & S. Ry. Co., La., 38 So. Rep. 913.

103. MASTER AND SERVANT—Obvious Dangers.—Where the danger incident to an employment was alike obvious to the master and servant, the master is not liable for an injury resulting therefrom.—Tham v. J. T. Steeb Shipping Co., Wash., 81 Pac. Rep. 711.

104. MASTER AND SERVANT— Respondeat Superior. — Defendant held liable for the negligence of its teamster in unloading lumber purchased by plaintiff in such a manner that it was permitted to slide down a hill onto plaintiff.—Dumontier v. Stetson & Post Mill Co., Wash., 81 Pac. Rep. 693.

105. MECHANICS' LIENS—Foreclosure.—A party seeking to foreclose a mechanic's lien held entitled to a personal judgment against the person liable for the labor and materials, though he failed to establish his right to a lien.—Western Plumbing Co. v. Fried, Mont., 81 Pac. Rep. 894.

106. MINES AND MINERALS— Contracts to Locate.—A party to a contract relating to the locating and working of mining claims held not entitled to enforce it without paying his share of the expenses incurred by the other party.—Mack v. Mack, Wash., 81 Pac. Rep. 707.

107. MINES AND MINERALS—Forfeiture of Lease.—That a landlord received rent or royalties due under a mining lease, after notice of forfeiture because of a continuing breach of the lease by the tenant, or after suit brought to recover the property, held not a waiver of the forfeiture.—Big Six Development Co. v. Mitchell, U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 279.

108. MORTGAGES—Dower.—Widow, selling interest in husband's land and taking mortgage for price, held to have extinguished any estate in the lands.—Bonstein v. Schweyer, Pa., 61 Atl. Rep. 447.

109. MUNICIPAL CORPORATIONS—Assessment for Street Improvement.—Owners of land assessed for street improvement held estopped to contend that the assessment was invalid for insufficient description of the property in the engineer's report. — Dunkirk Land Co. v. Zehner, Ind., 74 N. E. Rep. 1099.

110. MUNICIPAL CORPORATIONS— Authority to Vacate and Reopen Street.—Authority in a city charter to open, widen, or otherwise change streets within a city held not to comprehend the power to abandon the thoroughfare and open another to take its place.—Coker v. Atlanta, K. & N. Ry. Co., Ga., 51 S. E. Rep. 481.

111. MUNICIPAL CORPORATIONS — Coal Hole in Sidewalks.—A city held not entitled to actual notice of a defect in a sidewalk, consisting of a defectively constructed coal hole, as a prerequisite to its liability for injuries to a pedestrian by reason thereof.—Drake v. Kansas City, Mo., 88 S. W. Rep. 689.

112. MUNICIPAL CORPORATIONS—Right to Grant Exclusive Privileges.—A city, under the state constitution, held not authorized to grant exclusive privileges in its streets.—Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co., Ala , 38 So. Rep. 1026.

113. MUNICIPAL CORPORATIONS—Suit to Enjoin Abandonment of Street.—It is no defense, to a suit to enjoin the abandonment of a street, that the property owner will not sustain damage because another street to take its place will be opened, unless such street will be permanently maintained.—Coker v. Atlanta, K. & N. Ry. Co., Ga., 51 S. E. Rep. 481.

114. MUNICIPAL CORPORATIONS—Use of Public Funds for Municipal Liquor Dispensaries.— Municipal liquor dispensaries, established pursuant to Act Feb. 18, 1899 (Acts 1898-99, p. 108), constitute a public object, in the promotion of which public money may be lawfully invested.—Equitable Loan & Security Co. v. Town of Edwardsville, Ala., 38 So. Rep. 1016.

115. MUNICIPAL CORPORATIONS—Warrants. — Municipal warrants, valid on their face, are presumed to be issued for lawful corporate purposes, and the burden of proof, in an action thereon, is on the municipality to show otherwise.—Board of Comrs. of Greer County v. Gregory, Okla., 81 Pac. Rep. 422.

116. NAVIGABLE WATERS—Damage Occasioned by Injury to Drawbridge.—Where an obstruction to navigation by the negligent breaking of a drawbridge was such that barges could pass, but steamboats could not, the additional expense of extra steamboats should be allowed as damages —Pharr v. Morgan's L. & T. R. & S. S. Co., La., 38 So. Rep 943.

117. NAVIGABLE WATERS—What the Term "River" Includes.—The term "river" includes the bed of the stream up to its state of ordinary high water.—Minor's Heirs v. City of New Orleans, La., 38 So. Rep. 999.

118. NEW TRIAL—Erroneous Instructions.—Where the court erred in granting a new trial because of its error in holding that an instruction was erroneous, the supreme court will reverse the order.—Tham v. J. T. Steeb Shipping Co., Wash., 81 Pac. Rep. 711.

119. PARENT AND CHILD—Testamentary Disposition of Child.—The mother of an infant cannot, by testamentary provisions or otherwise, deprive the father of his right to its custody after the mother's death.—Gilmore v. Kitson, Ind , 74 N. E. Rep. 1088.

120. PARTIES—Suit for Injury to Freehold of Religious Society.—Trustees of a religious society held entitled to sue for an injury to the freehold of the society's land without joining the members of the congregation, under Sand. & H. Dig. Ark. § 5632 —Penny v. Cent. Coal & Coke Co., U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 769.

121. PARTITION—Jurisdiction.—A suit by an heir to annul a partition sale, on the ground that it was rendered by a court without jurisdiction, held to have been brought too late.—Byrnes v. Byrnes, La., 38 So. Rep. 991.

122. PARTITION—Supplementary Partition of Omitted Property.—The mere omission of a thing belonging to the succession from the partition is not ground for rescission, but simply for supplementary partition.—Succession of Sallier, La., 38 So. Rep. 929.

123. PARTNERSHIP—Authority of Partner to Bind Firm. —A member of a law firm held to have implied authority to bind his partner by a written contract for the purchase of law books.—Alley v. Bowen-Merrill Co., Ark., 88 S. W. Rep. 838.

124. PARTNERSHIP—Continuation for Accounting Purposes.—On dissolution of a partnership by sale of the interest of one partner, the partnership rights and obligations of the members of the old firm held to have continued for the purpose of the settlement of its affairs. —Corbin v. Henry, Ind., 74 N. E. Rep. 1036.

125. PARTNERSHIP—Dissolution.— Where one partner transfers his entire interest in the partnership concerns to his copartner, so as to vest in the latter the partner-

ship assets as his sole property, a dissolution of the partnership results.—Durham v. Edwards, Fla., 38 So. Rep. 926.

126. PLEADING—Amendment.—The court's discretion, exercised in allowing amendments prior to opening the case for trial, is not cause for complaint, if the pleas are not inconsistent with those previously pleaded.—Young v. Guess & Swanson, La., 38 So. Rep. 975.

127. PUBLIC LANDS—Forfeiture.— Default in payment of interest on purchase price of public lands bought according to terms of Sess. Laws 1878, p. 47, held to *ipso facto* forfeit the contract of purchase and all right of the purchaser.—Sehlbrede v. State Land Board, Oreg., 81 Pac. Rep. 702.

128. PUBLIC LANDS—Fraudulent Entry.—The United States held not entitled to repudiate a fraudulent entry of public land after the issuance of the patent confirming the same, as against a subsequent innocent purchaser for value.—United States v. Clark, U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 294.

129. RAILROADS—Crossing Accident.—Where, in an action for injuries to a traveler at a railroad crossing, the evidence as to whether the railroad company gave statutory signals at the crossing was conflicting, such question was for the jury.—Southern Ry. Co. v. Carroll, U. S. C. C. of App., Fourth Circuit, 138 Fed. Rep. 638.

130. RAILROADS—Excessive Speed.—In the absence of any statute or ordinance on the subject, no rate of speed in running a railroad train is negligence *per se*.—Southern Indiana Ry. Co. v. Messick, Ind., 74 N. E. Rep. 1097.

131. RAILROADS — Injuries to One Riding on Freight Train.—A carrier held not liable for injuries to one riding in caboose of freight train, which, under the rules of the company, did not carry passengers.—St. Louis, I. M. & S. Ry. Co. v. Reed, Ark., 88 S. W. Rep. 836.

132. RECEIVERS—Incidental Services Rendered Third Party.—Where a receiver operates properties of an insolvent in which a third person owns an interest, and is entitled to a fixed share of the earnings, it is his duty to pay over such share as it is received, and his failure to do so, or to pay the money into court and ask its direction, renders him liable for interest.—Rosenthal v. McGraw, U. S. C. C. of App., Fourth Circuit, 138 Fed. Rep. 721.

133. RECEIVERS—Interstate Commerce.—Receivers of a railroad company held not liable as such in an action to recover reparation for their participation in an illegal through freight rate; the action not having been brought until more than four years after they had been finally discharged.—Western New York & P. R. Co. v. Penn. Refining Co., U. S. C. C. of App., Third Circuit, 137 Fed. Rep. 343.

134. RECEIVERS—Sale of Realty to Reorganization Committee.—Nonparticipating creditors of an insolvent corporation, held not entitled to collaterally attack a sale of certain of the corporation's realty to a reorganization committee at the upset price fixed in the decree of sale, which sale was subsequently confirmed.—McEwen v. Harriman Land Co., U. S. C. C. of App., Sixth Circuit, 138 Fed. Rep. 797.

135. SALES — Damages for Breach of Manufacturing Contract.—A contract for the sale of springs and axles construed, and held to be a manufacturing contract, for the breach of which the seller was entitled to recover as damages the difference between the contract price and the cost of manfacture and delivery.—George Delker Co. v. Hess Spring & Axle Co., U. S. C. C. of App., Sixth Circuit, 138 Fed. Rep. 647.

136. SALES—Measure of Damages for Breach.—Seller cannot sue the buyer for general damages for breach of contract and recover damages determined by resale made after the commencement of suit.—Hardwick v. American Can Co., Tenn., 88 S. W. Rep. 797.

137. SALES—Measure of Damages for Breach of Warranty.—In an action for breach of warranty of title to corporate stock, buyer held entitled to recover the purchase price and interest, and not the value of the stock and dividends declared and paid.—Morgan v. Hendrie Bros. & Bolthoff, Colo., 81 Pac. Rep. 700.

138. SEQUESTRATION—Costs Where Writ is Sued Out in Error.—Where sequestration has been sued out as the result of an error for which both parties are responsible, the costs thereof must be divided.—Pharr v. Shadel, La., 38 So. Rep. 914.

139. SHIPPING—Duty to Protect Passengers from Injury—Where the officers of a ship allowed passengers to discharge firearms on board in a reckless manner, the owners are liable to a passenger injured thereby without his fault.—Northern Commercial Co. v. Nestor, U. S. C. C. of App., Ninth Circuit, 138 Fed. Rep. 383.

140. SHIPPING—Failure to Use Due Diligence in Equipment.—A ship cannot exempt herself from liability for damage to cargo from sea water as a peril of the seas, where such water entered because of the obstruction of a valve due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage.—The Brilliant, U. S. D. C., E. D. N. Y., 138 Fed Rep. 743.

141. SHIPPING—Injury to Tows from Swell.—A steamer held liable for an injury to scows in tow, caused by her swell while she was passing the tow in New York Harbor, on the ground that she was not navigated with proper care.—The Asbury Park, U. S. D C., E. D. N. Y., 138 Fed. Rep. 617.

142. SHIPPING—Liability of Charterer for Demurrage.—A charterer of a barge held not liable for demurrage because of delay in discharging a quantity of coal brought to the place of loading by the master under a contract with a third party.—Donaldson v. Severn River Glass Sand Co., U. S. D. C., E. D. Pa., 138 Fed. Rep. 691.

143. SODOMY — Indictment. — An information, under Pen. Code, § 286, charging that defendant committed the crime against nature with and on one Frank Derby, by then and there having carnal knowledge of the body of the said Frank Derby, held fatally defective for failure to charge that Frank Derby was a male.—People v. Carroll, Cal., 81 Pac. Rep 650.

144. STREET RAILROADS — Breach of Ordinance. — A breach of an ordinance of the city of St. Louis held to constitute negligence, for the results of which a street railroad company is liable to an individual.—Sluder v. St. Louis Transit Co., Mo., 88 S. W. Rep. 648.

145. STREET RAILROADS—Discovered Peril.—Though one may have been guilty of contributory negligence in being on street car track, the company is liable for any injury, if it could have been prevented by ordinary care.—Rapp v. St. Louis Transit Co., Mo., 88 S. W. Rep. 865.

146. STREET RAILROADS—Invitation to Alight.—Where a street car is stopped under circumstances justifying a passenger in believing that he is invited to alight, the conductor must not start the car while passengers are alighting.—Selby v. Detroit Railway, Mich., 104 N. W. Rep. 376.

147. STREET RAILROADS—Leases.—On cancellation of a lease of the property of certain street railway companies, an excess in value of equipment returned to one of such companies could not be set off against a deficiency returned to another.—Johnson v. Lehigh Valley Traction Co., U. S. C. C., E. D. Pa., 138 Fed. Rep. 601.

148. STREET RAILROADS—Negligence.—Where a street car approached a railroad crossing protected by a derailing switch, there was no negligence in the mere fact that the conductor of the street car left it and went ahead to operate the switch.—Camden & S. Ry. Co. v. Rice, U. S. C. C. of App., Third Circuit, 137 Fed. Rep. 326.

149. STREET RAILROADS—Negligence in Alighting from Moving Car.—Whether a passenger is guilty of contributory negligence in alighting from a slowly moving street car is a question for the jury.—Birmingham Ry., Light & Power Co. v. Willis, Ala., 38 So. Rep. 1016.

150. TAXATION—Fraud in Purchasing Tax Title.—The vendees, having refused to comply with a void executory contract to purchase land subject to certain taxes, held to have committed a fraud on the vendor in purchasing tax title, entitling the owner to redeem.—Ball v. Harpham, Mich., 104 N. W. Rep. 353.